

Mss B
L71
1826M
v.5

2 5
[Gould, James]

George F. May

Providence Rhode Island

YALE LAW LIBRARY



PRESENTED BY

Edward G. Fletcher

1934

Gift of
Edward G. Fletcher

George Man
Providence R. Island

1826. Nov. 16.

Thanksgiving night -
9 o'clock. Litchfield Conn.

Index of Real Property -

Estates in lands. Tenements and Rendiments -

6- A Freehold 6- Conditional Estate

14. Freeholds not of Inheritance

21. Tenant by the Curtesy of

England - 25. Tenant in Dower 26.

Estates less than Freehold 30. Estate at
will 32 Estates at Sufferance 35

Estates in Possession - Reversion and Remainder

36. Remainder how created 36. 1st Rule -

There must be a particular Precedent Estate -

36- 2^d Created at the same time with
the particular Estate - (only as to vested Rem^t the
holds) 40. 3^d The the Remainder must

rest in interest in the Grantee during the
continuance of the Particular Estate 41.

Remainders are vested or Contingent 42.
how defeated 44. The Extent of Remainders -

- 12. of what kind 46. Executory Devises 47.

By this a Freehold may commence in futuro
with a particular Estate - A Fee simple limited
upon a Fee simple - A Remainder limited

after a life estate in a Chattel Interest

Estates in Reversion 55. Estates upon

Condition 58. Vivum Vaduum and

Mortuum Vaduum 61.

Real Property

Things wh are y subjects of property, are by y Law of 2 kinds. Real and Personal. 2 Bl. 16.

Things real are such as are permanent, fixed, ^{tenements} immovable tenements. But all other things are personal, as money, goods, and things yt savour of y reality. 2 Bl. 16. 384. 87. Co Litt 118. 2 Wood 4. Things real are not only fixed and immovable, ^{But} and permanent, and in ys they differ from chattels real, for they are fixed et immovable, but not permanent.

Things Real, consist of Land. Tenements et Hereditaments.

Land, in Law. includes all things of a permanent, substantial or corporeal nature - being a word of extreme signification.

Tenement is a word of still greater extent, tho in its common acceptation, applied to houses or buildings, for it denotes in its original sense, every thing yt can be holden of a permanent nature. an corporeal or incorporeal - whereas land includes only corporeal things.

Tenement includes rents, lands, franchises, rights of common - Co Litt 6. 19. 20. 2 Bl. 7.

Hereditament. is a still more comprehensive term, for it includes not only land et tenements, but whatever may be inherited - It includes all inheritable things, an real, personal or mixed. - There are some things wh in their nature are strictly personal, et still inheritable - Thus an heirloom, is a hereditament, a family painting, a piece of ancient plate, or Jewels, watches, all are hereditaments and go to y heir at Law -

So also a condition of wh y benefit may descend, is an hereditament - 3 Co 2. 2 Bl 17. as a condition annexed to a Mortgage -

Now these 3 things - Land, Tenements and hereditaments are merely y subject of property.

Heredities are of 2 kinds. Corporeal, et Incorporeal.
Corporeal Hereditiments consist of substantial and permanent objects, all of wh may be included under y general denomination of Land

Corporeal Hereditiments then are all capable of being bro't, within y denomination of Land. - for land does not only comprehend earth, ground or soil, but water and buildings upon it. 2 Bl 17.8. Co Litt 4.

Hence a conveyance of land passes all buildings and structures standing upon it, viz they y buildings or Structures are reserved or excepted. A transfer of land witht any agreamt conveys all buildings and waters with it, and y bed of a River not navigable. as ponds, watercourses, 2 Bl 18.

But an action won't lie to recover a stream of water, "eo nomine" But y description shd be of so much land covered with water, for in water one can have only a transient, usufructuary property. But he may describe 20 acres of land covered with water Ibid.

Land has also an infinite extent, upwards as well as downwards, "Cujus est solum, ejus est usque ad caelum," is y Maxim of y Law. Upwards, Not only y surface, but y earth immediately below, to any extent, belongs to him. If A shd place a shade over y land of B. an action wd lie, This right extends upwards indefinitely and downwards to y centre.

A conveyance carries all minerals and fossils under y land as well as woods, waters, buildings - standing upon it.

Ibid These particular subjects, however, wood, ~~water~~ ^{water} and buildings - may be conveyed by yr distinct names, sepeate from y land - for tho' they belong to y land, they are not inseperable from it. The rule as to water, seems too broad, for by a grant of water nothing passes, except y right of fishing - & the whole interest don't pass. Co Litt 4.5.6.

An incorporeal Hereditament is a right issuing out of concerning, or annexed to, or exerciseable within a thing corporeal, and this thing may be either real, personal, or mixed. Thus rent is an incorporeal hereditament issuing out of Land - So an annuity tho' issuing out of y person of y Grantor. Ibid - Co Litt 19.20.

There is however a difference between y incorporeal hereditament itself and y profits it produces - now rent is an incorporeal right, but y money or thing pd as rent is corporeal. 2 Pl 20.1. For y kinds of incorporeal hereditaments of wh there are 10. see 2 Pl 21. There are several sorts unknown to our Law. as advowson - Tithes - Offices - Dignities, and Corodys - unless held of wh we know nothing. But a right of Common - right as a pension of way, annuities, pensions, rents et purchases are all unless held as a pension. incorporeal hereditaments by our Law.

As to right of Common, ys is a right wh one has to a profit in or upon y land of another. As if A has a right to pasture beasts his beasts upon y Land of B. by right of Common - If A has a right to fish in B's pond, ys is called a similar right. Now y owner of a right of way or Common - has ^{no} interest in y soil. If A has a right to pasture his beasts on y land of B, he has not a stiver of interest in y soil or land - but a mere right to herbage on y land - 2 Pl 32.

As to y right of fishing on another's land - y rule is, yt in case it is a navigable river or arm of y Lea, y right of y soil in y bed of y river belongs to y King, "prima facie".

But y right of fishing is common to all y citizens of y State, but in rivers not navigable, the right of fishing is ex-clusively in y proprietors adjoining, or those who own y banks of y River - 4 Burn 616.4. Doug 425. Talk 357. 4 Pl 437. 2. Pet P. 472. 1. Comm R. 382. 510. 1. Comm R. 382. 510. and right of soil and right of soil

belongs to
private persons,
belongs
to private
persons.

All navigable rivers are called arms of y Sea, as well as harbours, bays &c. In navigable rivers, y land belongs *Prima Facie* to y King, or state, but y right of soil as well as exclusive right of fishing, in certain sections of all our large rivers - but no person can have an exclusive right except by Grant - The fact then yt an individual owns y banks of a navigable river does ^{not} entitle him to the exclusive right of fishery, nor of y Soil. It belongs to y State for y benefit of individuals. 5 Co 107. 2 B & P 472. 1. Comt R 382. 510. Hardgraves Tracts 12. Hale de jure of maris - 26.7.

The same Rule exactly holds in relation to y Seashore, between y high and low water mark I.E. y right of soil between y high and low water mark is *"prima facie"* in King or State, but y right of fishing is in y citizens, no particular individuals have a grant exclusively to themselves - Individuals have not only a right to lie and pass in yr boats, but they have a right to dig on y Shore for Shellfish. 2 B & P 472. 72. 5 Co 107. Dyer 326. 4 Burr 216. 4 Burr 216. 4. Com Dig navigation a. 5 Day Peck ¹⁶⁴ L Lackwood. Ct of Errors. Nov. 1811.

belongs to y State
belongs

The Soil is *prima facie* in y State, but it may be granted to any individuals by y State, but if y Soil shd be granted and y Soil only y common right of fishing remains. If then y right of soil, "y right of soil of yt part of y shore" all persons have a right to fish, no y individual shows, yt he has a grant of an exclusive right of fishing. But both may be granted and then they become private rights.

All navigable rivers are regarded as arms of y Sea, & y same rules, yt apply to arms of y Sea, apply to navigable rivers. They are not y property of individuals any more yn y sea. A river is called navigable, as far as y tide ebbs and flows, and as y tide by rising affects y

water, and from y^t point, it ceases to be called a navigable river as y^e River Thames is called navigable as far as London, altho it is navigable for ships of 1000 tun. tons 100 miles above, but above London, it isn't called navigable.

natural and not navigable.

With regard to natural watercourses, Every adjoining proprietor up and down has a right to y^e use of y^e water within his own bounds, for culinary and other domestic purposes, and watering his beasts and y^s right is absolute.

He has also a qualified right to use y^e water for other purposes, as to move machinery, but y^s right he has not to such an extent as to exhaust y^e stream, as to deprive those below him of y^e water, for culinary and domestic purposes, and watering cattle.

2 Comt 584.

An adjoining proprietor may raise what machinery, he please, but he can't deprive others of water for these domestic purposes.

Again y^e proprietor ^{above} may divert y^e channel of a watercourse for irrigation and other purposes, proviso he returns y^e stream to its original channel before it reaches y^e line of y^e owner below, and y^e diminution by absorption is regarded as no legal injury.

But he can't divert it so far, as turn from y^e land of y^e proprietor below, if he does an action will lie.

6 East 208. 1. B et P. 400. 1. Com 282. 2. Comt 584. 1. Hob 1. Camp 463-382. 1. Wils 174. 10. Johns 241. 15. Do 213- 8 Mass 136. 1. Camb. 463.

The law with regard to these private water courses it is daily becoming more important

But a person may by Grant or 20 yrs adverse possession, or in Comt 15. acquire a special right to divert y^e whole watercourse - This Rule proceeds upon y^e Law of prescription, y^t when one has enjoyed a right by adverse possession, for 20. yrs in Eng. or 15. in Comt, he is presumed

2. Iron
504-

2
Lent 0-84.

ide Trespass
n y Case - in
ny Title -

See Tres. and
M. L. L.

to have come lawfully in possession, and as y^e Jury believe y^t it was a legal right or not, they are to presume it. I an adjoining proprietor below may acquire a right of a person up stream. - for it makes no difference -

Suppose A is a Proprietor above and B below. B diverts
y whole of y water from its channel & A acquiesces 20 or
15 yrs he can never claim it again. Ibid

Estates in Lands, Tenements & Hereditaments

An estate in Land. Tenements and Hereditaments, is y interest a tenant has in ym. Thus if A convey all his estate in Dale, to B and his heirs, all y interest he can possibly grant, passes to B. The subject of conveyance is not y soil, but y interest grantor has in y Estate, 2 Abb. Com 103, Co Litt 345.5. 1. PR 44.

The word Estate, then, "Præmia facie" signifies interest in y land - but sometimes it is used to express y property in wh one has an interest - Thus if one uses y word Estate in a devise, it is his intention to denote y land itself and not y whole of his interest in y land 2 IR 659. 2 BR 335. 3 Wils 414. 1 IR 413. 14-

The quantity of interest a tenant has is ascertained by its duration and extent, and hence of primary distinction of Estates into those of Freehold and those less yn freehold.

A Freehold Estate is one to y conveyance of w^h livery of Seisin is necessary by y C Law. Now in tenmts of an Incorporeal nature, there can be no such thing as a Livery of Seisin. But as to things incorporeal, there must be what is deemed equivalent to Livery of Seisin. in a thing Corporeal. 2 Bb 104. Litt 59. Section

Livery of
Paisni now
become rare
and in Eng
Livery of Paisni
is now disused
in Eng and here

But it ~~was~~
is $\frac{1}{2}$

And Estates to y^e transfer of w^{ch} Liv^g of Pres^{en} is necessary. are Estates of Inheritance. for Life or

or Fee auter, when y estate is for y life of another. An estate for Life means y life of y Tenant, when it is for y life another, he is called Per auter Vie.

An Estate of Free hold is an Estate of Inheritance or an estate not of Inheritance. The former are again divided into Estates of inheritance absolute, or Fee simple and Inheritance limited one species of wh is called Fee tail. 2 Bl. 104.

An absolute inheritance is what is called an Estate in Fee Simple, and y is an Estate in Land, Tenements and Hereditaments, wh are holden to him and heirs forever, generally and absolutely wth respect to any particular heirs. Litt. 8. 1. 2 Bl. 104. 6.

The term fee has originally y same meaning as feud or fief and in its original sense is taken in contradistinction to Allodium. The latter term signifies an estate wh one has in his ^{own} right and holds of no Superior, or who holds under no one, wth paying or owing any rent or service to any Superior or Landlord, but of wh he has y absolute and direct dominion in his own demesne. demesne

Fee in its original sense is an estate held of some Superior, in whom y ultimate right of y Estate is, So y^t on his death it reverts or escheats to his Superior or Landlord. It is held by performing service. But when land is holden by an allodial title, there is no such thing as an Escheat or Reversion.

All lands in Fee are held by a title strictly feudal and by y feudal law, y King is deemed to be y ultimate proprietor of all y land in his kingdom. the subjects can only hold particular estates on certain conditions of rendering their service. on on y subjects death the heir is entitled to it, or if y successor cant be found or ascertained, y land reverts to y King. 2 Bl. 104. 5. 2 Bl. 45.

In Connt y title of land to one and his heirs is declared

to be allodial. The It of Comt is, yt an Estate in Fee simple shall be allodial - ys is a legal absurdity or incongruity - By another if y owner of land dies, and by another, if y owner of land dies and no land owner or heir can be found - it shall belong to y State.

A fee is y highest estate any Eng Subject can have - no Eng Subject can have an allodial term. The holds of a Lord - Hence y highest estate an Englishman can have, in these terms, "that he is seised in his demesne as of fee"; But his demesne is not absolute, for he holds of a Superior, In pleading, y tenant alleges, yt he was seised in his demesne as of fee - 2 Blb 105.

But y word fee is now seldom used in its original sense, It is now usually used to denote, continuance of or duration of y estate, or quantity of Interest. 2 Blb 106.

The word fee then in its present acceptation signifies an Estate of Inheritance, witht reference to y particular Tenore and when y term is used simply without any adjunct, or has y adjunct simple annexed to it, it is used in contradistinction to a fee conditional at C Law or a fee tail by by It

The word fee denotes an absolute inheritance, witht condition - restriction or limitation to particular heirs, but when words are added, they make a conditional estate. 2 Blb. 206.

A fee in ys sense may be held in a hereditament, corporeal, or incorporeal - but it can be held only in a hereditament - for there can be no such thing as a fee in mere chattels, nor in y case of an usufruct - it wd be an absurdity to say yt a man has a fee in goods, wares, and merchandises, - Little 10. 2 Blb 106. 7.

The fee simple of lands is regularly and no doubt always vested in some person, i.e. it cant for a moment be in abeyance, or expectation

An estate may be so limited as to take effect in futuro, but y right cant be in no person and no where - 2 Blb. 107.

There are however, some qualifications to y^s Rule, several inferior estates may be carved out of y^e fee simple - Thus if one seized in fee simple, leases y^e land to A for life, remainder to B, for life, y^e fee simple remains in Lessor and his heirs - So if an Estate is granted to A for years, with remainder to B for life with remainder to C in Tail, y^e fee simple remains in y^e Grantor and his right of possession is to cease till y^e estates carved out are expired - Ibid.

The Fee simple

According to Pol. and some others, an estate may be in abeyance - can't be in - Thus if a grant is made to A for life - with remainder in abeyance - to y^e heirs of B. B being alive, y^e estate is not vested but in ^{Fearn's 286.} abeyance - till B dies - for until B dies, it can't be known ^{275. 286. 7} who his heirs will be - The present presumptive heir may on contingent die before B, while B is living he has no heirs - and here remainder - according to Pol. and others y^e fee simple passes out of y^e Grantor, and remains in possession till B's death - 2 Pol 107.

But y^s is not law, for y^e fee simple does not pass out of y^e Grantor, but remains in him, but remains in him till B has heirs - and if B dies leaving an heir, y^e estate in Remainder vests in fee simple in y^e heir - Fearn 275. 85. 6. 67. 513. Carth 262.

So also if a grant is made to a Sole Corporation, as to y^e Parson of a Church and his successors - y^e inheritance according to y^e above authorities, is in abeyance -

12 2 14
177 2

Litt Sec. 6 46. 2 Pol 107. & I conceive y^s to be incorrect, for what don't rest in y^e present grantee, remains in y^e Grantor - till it vests in y^e remainder man or successor - and so in each successor for life -

As successor after induction may recover all y^e interest and rights wh have accrued from y^e death of A, to his induction - This cd not be if y^e Estate was in abeyance - The Estate is given in trust for next successor or incumbent -

2 Pol 109.

See Fearn's y^e best treatise extant -

To pass a fee or hereditament of any kind kind, y words, "heirs" is generally indispensable - tho' in a Grant to a Sole corporation y word "Successors" is substituted for "heirs", and answers y same purpose - Therefore if land or an estate is granted to A forever, he has an estate for life, and if granted to him A and his assigns, he has only a life estate.

The word land signifies no quantity of interest, but y subjectmatter only. It is necessary to add y word heirs to denote y quantity of interest - and y word heir alone is satis to pass a fee simple, witht any word of perpetuity. "as to his heirs forever" a grant to A and his heirs is as good as a grant to A and his heirs forever - 2 Bl 54, 104.

In creating a fee simple by a devise in a will, it's not necessary to use y words heirs - for Devises are not O & L conveyances, but a more liberal rule prevails, for y law presumes, yt as man in making his last will can't have leisure to make a formal deliberate and technical conveyance - as in O & L conveyances. For y mode of conveyance is established by St. a Devise of all one's estate is considered as a devise of all one's interest - Cowp 659. 2 Bl 108.

To a devise to A forever - or to A and his assigns forever - carries a fee simple - but not so in a deed - in a deed, these words wd convey an Estate for life only -

In devises y intention governs when manifest, tho' not technically expressed - The words of perpetuity satis show y testator's intention - Doug 322 - 1 Bl 672 - 4 Burr 2579 - Team 113 - 2 Bl 381 - 188 -

But a devise to A and his assigns witht y words forever - or any word of perpetuity, carries only an Estate for life - for it don't appear - yt y testator intended any more - Ibid -

If one devises thus - "I give to A all my estate" when y testator has a fee simple - y word estate passes a fee simple - Because y word Estate denotes y interest, y testator has -

But if I say, I give all my land to A, it passes only an Estate for life. Land is only descriptive of y Subjectmatter Cowp 659. 1. JR 412- 2 Geo 657. 4 Do 923. 5 Do 562. 6 Do 34. o/p. 502. 1. H 186 223. Doug 734.

Some have taken a distinction between a devise of all my estates generally - and a devise of all my estates in such a place - holding y^t y latter is only descriptive of y subjectmatter and shows y^t y Testator meant only his land - Cowp 306. But y^s is not supported by authority - Whether y form is either way, y whole interest passes - and no real estate except Fee Simple can be devised - Fee tail can't be devised. quia y testator has no further interest in it. 1. JR 411. 2 Atk 37. 1. Ves. 228. 2 Do 614 2 P Will 524. Cowp 355.

It is immaterial what words are used in a Devise, if y manifest intention is, to pass a fee simple - Thus A devises in y^s form - I give all my effects personal and real - it passes a feesimple in y real property and an absolute title to the personal property - Cowp 299. 1. East 33. 3 Do 576. 2 NR 343 - So where an owner in Fee Simple, says, ⁵¹⁶ I devise to A all I am worth, it passes a feesimple in y feesimple in y feesimple lands.

It has been held. by some, y^t y word hereditament in a devise "ex vi termini" carries a fee - But by y^s I suppose hereditament implies fees inheritance - but y^s conveys only a life estate 5 JR 558. 3 Do 356. 6. Do 175. 8. Do 497. Salk. 239. 1. Bet P. 558.

"All my property", in a devise passes prima facie a fee simple - also property means y same thing as Interest or Estate 2 NR 221. 2 And even y word legacy has been held to signify real property in a devise and convey a Fee simple, when from other parts of y Instrument, when from other parts of y instrument, an intention to convey a feesimple, appears. Doug 39. 1. Burr 268. 1. P W. 182. 5 JR 576. 1. East 37. note 5 JR 715.

And a devise of lands, y devisee paying a good sum as debt
or legacies } will carry a fee. 1 Co 16. 2 A R 343. seems y devisee
might be a loser. - He is always supposed to be y object of y
Testator's bounty - But he might die y next day and then lose y whole
sum advanced, if he took only an Estate for Life - Pow. 502. Sto 281
293. 2 Keb 49. 1 Pet P. 301. 3 Burr 1623. 3 TR 358. 2 A R. 213.
Devises 115. 3 Keb 43.

But a devise of land, y devisee paying a certain sum out
of y profits, passes only an estate for life. Here y devisee can't
be a loser. For y condition don't oblige him to pay more y'n
y profits will enable him to pay. 6. Co 16. Corp 239. 2 A R 343.
vide 3 TR 358. 5 East 87. 3 Burr 1618. 1723.

A devise of land of a given annual value, y devisee paying an
annuity less y'n y annual value, passes an estate for life only.
Causa qua Supra - Seems if y annuity was greater y'n y value -
6. Co 16. 5 TR 13. 3 Burr. 1533. 1618. 23. 2 KB 381.

a devise of rents and property of land, is in effect y same as
a devise of "land" itself - The rents and profits constituting y
whole value of lands. Salk 228. 1 Equity Cases 382. La Ray. 877.
1. Brow Chy 75. Mod 753. 8. 1. A R 116. 2 Ld. 220. 7 East 97.
2 Leon 221.

How far introductory words in a devise operate to carry a fee
as. *As to all my worldly estate. - I dispose of y same as follows.
Such words are not "per se to carry a fee 5 TR 563. 13.
14. 3 Burr 1625. Corp 299. 306. 664. 3 P W 294. Salk 157.
Doug 730. 759. 8 TR 64. 7. 1. Pet P. 563. n. 1 A R. 343. 4.

these words
will turn y
scale, when
it is seems
balanced

A will attested by 3 witnesses is ~~not~~ satis to show an intention
to pass a fee. 2 A R. 116. 7 East 97. 2 A R 220.
But now it
is decided

because 3 witness, Again y word "heirs" is not necessary to pass a fee by fine,
make no odds - or common recovery - For by these a fee passes by act and

But now, decided seems
3. witness is make no odds

Operation of law 2 Bl 105, 354.7.

To in grants of land to a sole corporation. The words "heirs" is not necessary or proper, for y purpose of passing a fee. Successors supplies y place of heirs. - The word "heirs" wd have y effect of devising y estate from y corporation, and making it y private property of y individual - 2 Bl 108,

And in a grant to a corporation aggregate, neither y words "heirs" nor successors is necessary. For the such a grant is strictly a sole corporation only for life, it is equivalent to a Grant of fee. Since an aggregate may die - corporations never dies, 2 Bl 109, 1. Do 448, as a Parson

So of a grant to y king, for in judgment of law, he never dies. A sole corp Besides his prerogative dispenses with y gen rule - 2 Bl 109, may die - as a Parson. 1. Do 249.

So doubtless of a Grant of land to a Sovereign State. Independently of any sovereign prerogative - tis an aggregate body politic - like a particular corporation aggregate - Can there be in such a grant any proper words of limitation. I Now I conceive a grant to y heirs and successors of a State wd be unintelligible -

Heirs is generally a word of limitation, not of description - or purchase - 1 E. expressive of y quantity of interest - granted or given - (1) Land limited to A for life, remainder to his heirs - A takes a fee simple - 3 Burr 1006.7. 1 Bl 533. 5 Tr 320. 4 Tr 82-294. 1 Burr 38. 2 Bl 172 note. So if to A for life, remainder to B for life - remainder to y heirs of A - A takes a fee subject to y intermediate remainder - Fearn 21 to 31. 42-6. 79-82-90. a. 2. 101.7. 112-4. 125-294. 11 Co. 79. b. 1 Co 10, 93. 104-5- 2 Boll 417. 2 Ins-22-6- Devisees 80- (Schelly's case 1 Co. 93. 105-) 2 Bl 172, note- 1. Burr 38, But y Eng

The interest called a remainder in both cases, vests immediately in y ancestor - in y former case it vests in possession at y creation secus of y Estate - in y latter it is not executed, or vested in possession But y till after y determination of y intermediate remainder - Fearn 25-6- Eng so has deced secus.

Raymond 339.

So of y word heirs of y body "mutates mutandis" They are not used as "description" personae, but are descriptive of y quantity

of y quantity of interest - They convey an Estate Tail - *And* -
 Heirs being regularly a word of limitation - a devise to y heirs of
 A - conveys no estate, ni A dies before y Testator - It is a
 contingent executory interest - It must take effect, if at all on
 y testator's death - But if A is alive at y time, there is no heir -
Nemo est Heres viventis - Cow 313, 4. 2 Vent 313. Raymō 332 -

But if from other words it appears yt y
 word "heirs" was used as a word of purchase or description - y heirs,
 or heir apparent, will take as purchasers, as Devise to y heirs of
 A now living - *Fearne* 143. (*Devisees* 81) Raymō 330. 2 Vent 313.
 1. W. Mill 229. 1. Tomb 421. Poll 457. 2 Lec. 232. 1. Vent 343.
 2 Bl R. 1010. 2 Burr. 1100. The heir apparent takes a fee -
 2 Vent 313. 1 Pontblanc 421.

So a devise to A for life, remainder to y heirs of B, here y word
 "heirs" is a word of purchase - and a fee simple passes to y heirs
 of B. - Where a limitation is to heirs, and it is construed as a word
 of purchase, it contains a fee simple of course - In a deed, y
 word, heirs is never regarded as a word of purchase - But
 it is taken in its technical sense - as a word of limitation -
 Note y^s distinction - yt if an Estate of Freehold is limited to an
 ancestor for life, with remainder to his heirs, either directly or indirectly -
 mediately or immediately, the Ancestor takes a fee simple, and y word
 heirs is a word of limitation - But where y Estate is limited to
 A for life, remainder to the heirs of B, it is a word of purchase
 since y heirs of B can't inherit from A. - as to the first rule, some
 authorities on y^s page - 2 Vent 313

An Estate given to any one and his heirs - can't be qualified
 by an abridg^{mt} of any of its legal qualities - as yt it shall not
 descend - be devised - or aliened - Co Litt 13. 8 Tr 61. Doug 329.

Conditional Estates

II Limited fees are such estates of inheritance as are clogged
 with condition or qualification, of any sort. 2 Bl 109.

There are 2 kinds - 1st. qualified or base fees, 2. fees conditional at C L., most of wh in consequence of y^e St "de donis" have become Estates Tail - 2 Pl 109.

II a base fee is one, wh has a qualification annexed, and must determine when y qualification are at an end - 2 Pl 209. Base fee are out of use
as a Grant to a and his heirs, tenants of y Manor of Dale - Whenever y heirs cease to be tenants of Dale, y grant is defeated - 2 Pl of use 109. C. Litt. 27.

III a fee conditional at C Law is a fee restrained to some particular heirs of y Grantor - as to y heirs of his body, or y heirs male of his body - 2 Pl 109. It is called conditional, not by reason of y condition expressed or implied in y Grant, yt if y Donee die witht such heirs, y land shd revert to y Donor, 2 Pl 109. Flow 241.

But if y Donee had any issue - y Estate was considered as absolute by y performance of y condition I.E for 3 purposes - 1st to enable him to alien - 2nd to subject y land to forfeiture for his treason - 3rd to enable him to charge and encumber y land, so as to bind his issues 2 Pl 3. C. Litt 19. 2 Instr 233. 4.

But if y Donee did not alien, and his issue died before him, y land on his death reverted to y Donor, For it cd not by y terms of y Grant, descend to any other y^e "heirs" of his body. 2 Pl 111. 110.

If he left issue, the Fee become absolute in ym - 2 Pl 110. In consequence of y first afore mentioned construction of these grants, y St Mst m^t 2. (13. Ed. 1.) called y St "de donis" conditionalibus - enacting yt y will of y Donor shd be observed and yt y ~~tenants~~ shd at all events go to y issue - if any - and if not revert to y donor. 2 Pl 112.

In y construction of y^e St. y Judges held, yt y ^{birth} ~~case~~ of issue and was no performance of y condition - But they divided y Estate into 2 parts - viz a new kind of particular Estate called Fee tail vested in y Donee, and y ultimate Fee Simple expectant

in y determination of y fee tail vested in y Donor, wh latter is called a reversion and thus y^s fee converted from conditional into fee tail. 2 Bl 112

"There is no remainder after a fee conditional," is considered as a fee simple on condition y^t y Donor had issue - 2 ves 170, 2 Bl 113. n- 1. Brown Chy 325-

Thus Estates in fee tail originated in y "St de donis" Litt 4. 13, 2 Bl 112. The only words in y St wh designate y subjects of y^s species of Estates, is "Testamentary" wh includes all corporeal hereditaments, and all incorporeal wh savours of y reality, as Rents, Commons - 2 Bl 113 Co Litt 19. 20. 7. Co 33.

But an annuity wh charges y person only and not y land of y Grantor, can't be entailed - it is not a tenement. 2 Bl 41. 113. Co Litt 144- ante 1. So of offices wh regard y personalty only - 2 Bl 113.

An annuity then if granted to one and y heirs of his body, is a fee conditional at C Law 2 Bl 113. Co Litt 19. 20., alienable post issue born - and admitting of no remainder, as Grant of a sum of money annually to A - and y heirs of his body - 2 ves. 170. 1. Br Chy 325-

A mere chattel can't be entailed - nor can y grant of it to one and y heirs of his body create a fee conditional - Such a grant vests y same and entire with y entire and absolute interest - and admits of no remainder - Such things being movable, transient, and of themselves perishable - are not fit subjects of inheritable interest - Even a life Estate includes y whole interest in ym - at C L - 2 Bl 113. notes 174. Co Litt 20. 1. Br Chy 274. 2 Bl 398. Pow Dev. 243. 10 Co 78. Fearne 304-5. 342. 3 P Wms 259. 8 Co 95.

But by words, wh in y limitation of real Estate wd create an Estate Tail by implication - a remainder in a personal chattel may be limited even after a life Estate, by way of Executory devise - proviso y contingency on wh it depends, if upon any - happen within y time prescribed by law - as to A, and if he 359 die witht issue living - B. Tene not - 2 Bro Chy 259. Fearnes 359

21. yrs.

21. yrs

1. Plow. 663. Executory Devises - 22. 1 TR 393. 1 B et P. 215-

"The words, 'if he die without issue,' are construed less strictly in
in y limitation of personal y real Estate, tho' used but once in y
same will and applied to both kinds of property. 1 B. Wms 432
163. Fearn 356. 361.

And even express words of entailment may by other words be so
restrained, y a subsequent limitation of a Chattel interest - will be
good by way of executory devises. as Lease of a Term for yrs
to A and y heirs of his body, and if he die without issue living -
then C. Fearn 354 371. 83c. Palk 225. 1 B Wms 663. 2 TR.
720 Pow. Devises 232. 7. Executory devises

An estate tail; (ut Supra) may in a devise be created by implication
as a devise to A, and if he die without heirs of his body to B.
or if he die without issue - (not so in a deed 2 Bb. 115. 81)
Fearn 170 300. 3 TR 183. 9. Co 127. b. 1. B Wms 605. 3 atk 398.
Cart 343. Cro E 525. 2 atk 308. 310. 4. Cowp 234. Cro J. 415.
2 Bb 381. Camp 539. vide Executory Devises 24.

So of a devise to A and his heirs, forever, and if he die without
heirs of his body, to B. A takes an Estate Tail. Fearn 170
301. 2. 7 TR 276.

So if y words were if he die without issue, heirs. Cro 324.
3 TR 148. 6. 8 TR 5. 211. 5 TR 336. Devises 90. 92-

Proviso the remainder over is to a collateral heir of y first
devisee - Cowp 324 - 5 TR 337.

For y Species of Estate Tail vide Bb 113. 4. 9.

General and Special, Tail male - General Tail Male, General
Tail Female - General Tail Male Special - General Tail
female Special - Litt S 14. 5. 6. 26. 7. 8. 9.

In case of Tail Male, y descent must be deduced wholly
by heirs male - and e converso, - Thus in case of an Entailed
Male - neither female issue nor their issue can inherit
and e converso. 2 Bb 114. Litt S. 24. Co Litt 25. Post 21.

As y word "heirs" is necessary to create a fee by deed, so y word body, or some other word of procreation, is necessary to create a Fee tail by deed. 2 Bl 114, 5. Co Litt 20. 2 Bl 381. If then either words of inheritance or words of procreation are omitted in a grant, a Fee tail will not pass, as Grant to A and y issue of his body, or seed to A or children — or offspring, an estate for life only passes, there being no words of inheritance 2 Bl 115.

Co Litt 20.

E Contra. A grant to A and his heirs male or heirs female passes a fee simple, and not a fee tail, there being no words of procreation to make it a Fee tail (and a limitation to one's general heirs, &c, made by its terms create an Estate unknown — to y Law. Post 24 2 Bl 115 Litt Sec. 31. Co Litt 27. a 5 Y R 338.

The words are taken most strongly vs y Grantor and y word Male is rejected — The limitation stands as if it were made to A and his heirs — 2 Bl 121. Co Litt 36.

But a grant in these words by y king is void, it creates no estate, for as vs him y word male can't be rejected — 2 Bl 121 and then y estate ~~tail~~ made be neither Fee simple nor Fee tail and y law don't allow no new species of Estate — 5 Y R. 338.

The same words in a devise create a Fee tail, y intention may be infered from any words — Doug 322. 2 Bl 381. 5 Y R 338, 2 Bl 115. Kelly 175. And by devise an Estate tail

Posteriority means, may be created witht y word heirs, — For even a Fee Simple lineal descendant may be created witht y word heirs by devise — to A and his posterity — such a limitation in a deed and not collateral seed — to A and his posterity — and give A but an Estate for life — for want of words of not collateral inheritance — 2 Bl 115. 381. 1. H Bl 447.

Termined

So of a devise to A and his children — so to A and his issue — he having none — (ut Supra) For y intent is yt they sha take, but they can't take immediately — quia not in esse

nor by way of remainder, for yt wd be vs y intent, y devise being immediate - A ergo takes an Estate Tail de cendible - on his lineal heirs - 6 Co 17. a - 2 Hb 115. note - Doug 306. 9. 10. 1. Hb Hb 456. 69. 1. Buls. 219. 1. Vent 227. 31. vide 4. LR 294. 2 Bern 549. 5.

But under a devise to A and his children, he having at y time, he and they take together as Jointenants - for life - 6. Co 16. b. 17. b. Cro E 74. 5. - Only y children then in Esse will take A. - Cow 314. 1. ves. 114.

Here there are no words of limitation, nor is there any necessity for considering ym in y capacity of heirs, for they are by y supposition in Esse and Can take now. and y construction completely satisfies y words. - But after born children can take nothing, for y devise is construed in reference to y state of things at y time of making y Instrument -

If one devise to A and after his death to his children, he then having children, he clearly takes an Estate for life - and they a remainder for life - For y intent is, yt they shd not take immediately, and they can take by way of remainder, and no words of limitation are used to create a Fee tail - and therefore they can't take by descent. 6. Co 16. C. Mod 297. - Co Litt 9. a - 2 Bern 545. Doug 306.

And his after born children will take with y others.

Cow 309. 14. quia y devise not being immediate, is not construed to be defined to those in being at y time y limitation was made -

So if y words were y same, and A had no children - at y time, (for y reason Supra) Sed Quere - for some have supposed y rule to be different, tho there appeared no satis reason for such a distinction - nor any satis authority for it -

Doug 415. 7. 6 Co. 17. a - Mod 220. 2 A Bruns 543.

And in y case. every child A has or may have will take in remainder - 6. Co 17. b. Cowp 314.

4 Cruise Digest
35- 35.

If an Estate be limited to A and the heirs female of his body, his female issue will inherit, tho he has a son - and y females are not heirs general, Co Litt 214 b. 27. b. n. a Cruise 35.

But it was olim held - yt if an estate was limited to y heirs female of A, as purchasers, and A had a son, y daughter cd not take - not being his heirs - Co Litt 214. b. 27. B. n. a - But y^s seems not to be law. Co Litt 164. a 2 Burr 2116.

We have in
Comm. a St
making y tail
See. fee simple upon
y birth of issue
and makes no
use, fine and
recovery.

The incidents to a tenancy in tail - are - 1st the tenant is not liable for waste - 2^d y wife shall have dower in y estate - Third, yt y husband of y tenant shall have courtesy - 4th yt y estate may be barred - by a fine or recovery - or by lineal warranty descending with y assetts - to y heir - 2 Plb 115. 16. Co Litt 224.

For fine and common recovery. 2 Plb 348, 364.

For lineal warranty. 2 Plb 303. 300

Estates Tail were held to be bared for y first time, for common recovery - in 12. Ed. 4 - and made forfeitable for Treason - by St 26. Hen 8 - They were declared to be barred by fine - by St 32. Hen 8 - 2 Plb 116. 17. 8.

The tenants right to levy a fine or suffer a recovery, is inseparable from an Estate Tail - and hence a condition in restraint of a right is void - 4 TR. 613. 4. 6. TR 61.

By St of Connt, estates Tail become absolute - i. e. (in fee simple) on y immediate issue of y first donee in tail - St Connt 43. as did Fees conditional at C L - ante 16.

21.

Real Property. Freeholds not of inheritance

Freeholds not of inheritance are estates for life - 2 Bl 120.
These are either conventional, i.e. created by contract or act of parties - or legal being created by operation of Law - Conventional are always created by some species of common assurance - as by deed. devise - 2 Bl 120.

~~Conventional~~ ^{Conventional} Estates for life (i.e. such as are created by deed, or devise) may be for one's own life, for life of another, or for more lives than one - as devise to A for his own life - or during y life of B, C & D., in wh case it continues till the death of y last survivor among yt number.

Legal are always for life of tenant only and can't be for y life of another - 2 Bl 120.

An Estate for y life of another is usually called per auter vie. 2 Bl 120. Litt J 56. If limited to one and his heirs, and y tenant die living Cestui que vie - y heir takes it as Special Occupant - If not thus limited it was open at C Law - to y first occupant - Now by St 29. Car 2 - ch 14, Geo 3., it is devisible. If not devised it goes to y personal representative. 2 Bl 256. 61. Co Litt 41. It's ~~not~~ devisible under Count St.

A life estate can't be conferred at C L - without Livery of Seisin - It being a Freehold - 2 Bl 120. Litt 42. 59.

A general grant not defining any specific estate, passes an Estate for life, as a Grant of Blackacre to A. It can't pass a fee for want of words of inheritance. But it must be construed to be as large an Estate as y words will bear, i.e. an Estate for life. 2 Bl 121. Co Litt 42 - ante 19.

And a grant not defining any specific estate, as a grant

for term of yrs life generally passes an Estate for y life of
y Grantee (if y Grantor had authority to make such a grant.)
as being more beneficial yn any estate for another's life -
2 Ab 121, Co Litt 42-36.

And any estate, except an estate of inheritance at will or
in sufferance) wh having no determined duration may
last during y tenants life, is a life estate: as to a woman
during widowhood, to live till she shall marry or leave y
realm. 2 Ab 121, Co Litt 42-3 Co 26,

An estate for y tenants life is usually granted for y term
of his natural life, quia any estate for his life may generally
be determined at Law by his civil death - as by entering a
monastery - When thus granted his civil death don't determine
his estate - 2 Ab 121, 2 Co 48, Co Litt 132- 1. Ab 132-

The incidents to a life Estate, wh are applicable to legal as well
as conventional, are principally y following

II The tenant if not restrained by contract or covenant or agreement
may of common right take upon y land reasonable estovers,
IE. necessary wood for y use of furniture of y house or farm -
as to repair barns - to make and repair instruments of husbandry
and to keep hedges and fences in repair - These rights being deemed
necessary to y complete enjoyment of y Estate - Tho they are
allowed of course as rights, they may be taken away by
express agreement - 2 Ab 35-122 - Co Litt 41-53. Post 41.

But not to cut timber (for other purposes) or to do other
waste, this not being necessary to y enjoyment of y Estate -
Ab 122 - Co Litt 53.

X III The tenant is not to be injured by any sudden determination
of his estate, ni by his own act; hence if after sowing and
before harvest, he dies, his Executors shall have y emblemt -
or Crop. quia actus dei nemini facit injuriam;
Emblemts are y profits or crops produced by annual labour

23
as Corn Grain of all kinds, Esculent Vegetables - but grass
and herbage wh grow year after year, witht culture are
not emblemty. 2 Bb 122-3. Co Litt 255 or 55.

So if y Cestui Que Vie die between y time of sowing and
harvest, for y same reason - The tenant shall have y emblemty.
2 Bb 123. So if y estate is determined by operation of
Law, as where a lease is made to a husband and wife
during coverture - and between sowing and harvest y husband
or wife dies - or they are divorced a "vinculo matrimonii"
y husband has y emblemty. 2 Salke 123. 5 Co 116

Seems if determined by y act of y tenant, as by forfeiture for
waste, or if a tenant during widowhood marry. 2 Bb 123.
Co Litt Litt 55. Post 413.

IIII. The undertenant or lessee of a tenant for life have
y same and even greater indulgencies - Thus if a tenant during
widowhood lease her estate and marries between sowing and
harvest, her lessee shall have y emblemty.

It is not his act, he can't prevent it. 2 Bb 123.4. Co
Litt 55. Cro Eliz 461. 1 Roll 727.

And at C.L. y under tenant might on his Lessors death,
leave y premises and avoid y paymt of all rent accrued,
after y last day assigned for paymt - Thus if y original
tenant shd die at y end of Eleven months, y tenant might
abandon y land and escape for an y paymt of rent for y years.
Because by y C.L. rent is not apportionable. But now by
St 11.11. George 3. II. he is obliged to pay y executor -
pro rata - 2 Bb 124. 10. Coke 127.

If any tenant for life underlets for yrs and dies during
y term - y lease is determined by his death, unless previously
confirmed by y reversion - 2 Bb 325. Litt Jr 516. 3 Bb.
397. Popph 105. Coup 482. 1. Fb 86.

An Estate for life is forfeited by alienation in fee - 2 Bl 125. Co Litt 27.

So by waste as well as by y commission of Treason - or felony - Thus if y tenant for life make a deed of y land in fee - or for any greater estate; ym he has himself he forfeits all his interest - This is by condition wh y law annexes to every such estate - Nor is there any need of any Express condition -

Life Estates created by operation of law are of 3 kinds -

I A tenant in tail after possibility of issue extinct one in whom an Estate in Special tail has been limited and when y person from whose body was to spring y issue, dies either witht issue or leaving issue wh becomes extinct, 2 Bl 124,

Litt J. 32. In y case, y estate wh was originally a fee tail can't possibly ~~extend~~ descend - 2 Bl 124,

It can be created only in y manner stated above, not by grant or any mode of conveyance. 2 Bl 125.

Hence if an Estate was limited to one and his wife, and y heirs of their 2 bodies, and they are divorced a vinculo matrimonii - neither of ym has y estate, but they are merely tenants for life, for when there is such a divorce, y children are deemed illegitimates - 2 Bl 125. Co Litt 28.

The Law supposes y possibility of issue always to exist till extinguished by y death of one of y parties. 2 Bl 125. Litt J. 34. Co Litt 28.

The estate is of a mixed nature, partaking partly of an Estate Tail and partly of an Estate for life - The tenant is like a tenant for life in y case, yt he forfeits his estate for aliening ym in fee - Like in a Tenant in Tail, as not being punishable for waste - 2 Bl 125. Co Litt 27. 8.

But if he cuts down timber, y property in it is not his - It belongs to yt person living at y time, who has y first estate of inheritance in y land. Suppose y immediate remainder

to A in fee or tail - he being in Esse is entitled to it -

But suppose y first remainder to A, ~~in fee or tail~~ - (unborn, at y time) in tail, remainder to B. (in Esse) in tail or in fee - it is construed - 2 P. Will 240. 2 Bl 125. note -

But in General y is regarded in Law as an estate for life only - Hence y tenant may exchange with a tenant for life - 2 Bl 126, 323.

Tenant by y Curtesy of England, is where a man marries a woman seised of an Estate of inheritance, and has by her issue born capable of inheriting y Estate - he surviving her, is tenant for life of y land by y curtesy. 2 Bl 126.

Litt J. 35. 52.

To y Estate, there are 4 requisites necessary. Marriage. Seisin, issue, & death of y wife - 2 Bl 127. Co Litt 30.

1. as to marriage, y must be legal, or as expressed in Eng. canonical and legal - Secus there can be no legal right in y husband - 2 Bl 127. The husband is not entitled if his own wife is an idiot, there is no lawful marriage - 2 Bl 127. 30. Plowd 263. Co Litt 30.

2^d Seisin of y wife - This must be actual seisin at her death - 2 Bl 128. 2 Lev. 26. Bull 158. 9. a bare right of possession is not Satis - for in such a case y issue ed not inherit - (3 Day 160 Contra) 2 Bl 127. 8. Co Litt l. 15. a - 40. Hence a husband is entitled to no curtesy in a wife's remainder or reversion - 2 Bl 127. 8. & Co Litt 11. a. b. ut Supra -

The meaning of y Rule is, yt y heir of an ancestor disseised can't inherit yt land, but derive his title from a prior ancestor, But how it may be asked, is y heir to inherit at all, when land has been purchased by y disseised ancestor, He takes it by a fine of indefinite antiquity 2 Bl.

There is an exception in some cases of incorporeal hereditaments - where seisin is impossible - 2 Bl. C. 127. Co Litt 29.

Issue must be ~~Issue~~ born alive quia seans it not capable of inheriting, indeed
 3.^d Issue Indeed one reason why probably was allowed of privilege & courtesy
 some of it might be enabled to support & maintain himself & wife 2 Pl. 127. 8. Co Litt 29.

+ And during y wife, seans if at her death,
 y husband had no issue, y land wd descend to y child ex ventre,
 2 Pl. 127. 8. Co Litt 29.

In gavelkind land y husband has custody till issue
 2 Pl. 129. 8. Co Litt 30.

The issue must be capable of inheriting y estate. Hence if y wife
 is tenant in tail male only and had male issue, y husband
 has no custody. 2 Pl. 128. Co Litt 29.

+ The time of y issue's birth is immaterial, if during coverture, an
 before or during her siesin, is immaterial. So an dead or alive
 at the time of her siesin, or death, for his righ is inchoate by
 y child's birth - 2 Pl. 128. Co Litt 29.

The husband may have an Estate of courtesy in y wife's right of
 Equity of redemption, even on a Mortgage in fee, tho' tis a mere
 equitable and not legal estate. as "Henne Sole mortgages in fee, and
 then marries. Yet in a parallel case y wife can have no dower
 Pow. Mort. 112. 15. 1. Atk. 603. Title Mort. 3. 4. Post 36.

By birth of y issue, y husband becomes tenant in tail by y
 courtesy inchoate - But y estate is not consummate till y wife's
 death. 2 Pl. 128. Co Litt 30.

III. Tenancy in Dower.

If a husband siesed of a state of inheritance, dies, his widow has
 a life estate in 1.^{3d} part of all lands and tenements, if wch he
 was so siesed at any time during coverture and wch any issue

21
yt she might have had, might by possibility have inherited.
She is called tenant in dower. 2 Bl. 129 Litt J. 36.

1. She must have been actual wife of y de^d after at his death
to entitle her to dower. If divorced a vinculo matrimonii,
She can't be endowed. 2 Bl. 130.

Secus if divorced a mensa et thoro, for y^s don't dissolve
y marriage - y relation of husband and wife still continues -
tho such divorce exists. This causes a separation of y^r persons,
not a determination of y marriage relation. 2 Bl. 130, Co Litt 32.

If y husband was an idiot, y wife has no dower for there
was no marriage in law. 2 Bl. 130, Co Litt 31. Thm Contra.

Dower by ancient law was forfeited by y husband's for treason
or felony. This Rule was abrogated by St 1 Edw. 6th. But
by St 5. et 6th Edw. 6th y widows of traitors are in general barred
of dower, tho y wives of felons are not. 2 Bl. 130.1.

In case of treason such Sts are forbidden by y Constitution of
y U^S indeed none can be made extending y effects of y treason
beyond y traitor, and therefore y wife and heir of a traitor can't
be ousted of y^r rights - by the husband or ancestors treason - and
in no State does ~~forfeiture~~ work a forfeiture of property.

Cons. U^S. art 3. Sec 3-1 ^{felony} This section extends to all y States -

Invasion vs Comt not be treason vs all and not any one - as such
an alien can't be endowed, ni by especial St, for at C^L.
no alien can't hold land - tho he may by act of Legislature - Alien cease
2 Bl. 131. Co Litt 30. ni y queen Consort. 2 Bl. 131. to be such
post naturalized

This Rule has been modified by some of y new Sts of y Union - Alien cease
Eng Enciclopedia - Alien - to be such
post natural,
-red -

Independant of these local Sts, if a american marry a french
woman she cd not hold real estate by dower, unless made
capable by special St of y legislature - ut Supra -

By Eng law y wife must be 7, 10 old at y time of y husband's death, or she can't be endowed. 2 Bl. 131.

The estate in wh dower may be had, must be one wh an-
some wh y wife might have had, might by possibility have
inherited. As a Man seized in fee and having a son by his
first wife, marry a second, y latter shall have dower, for
if y issue of y first had died, y of y second might have
inherited. 2 Bl. 131. Litt J. 36. 53.

But if one holds lands to him and his heirs of his body by
his wife & his wife can't have dower, for her issue ed
by no possibility inherit it. 2 Bl. 131. Litt J. 53.

Saw

Seisin in Law - is satis of present possession of y freehold - The reason is, tis not in y
to entitle y wife to dower. wife's power to bring his title to actual seisin, as it is in y
husband, to do with regard to y wife's land, Seisin in case
of Courtesy. ante. The reason of distinction is ut supra 2 Bl. 131.
Co Litt 131.

a Seisin of y husband for any period of time, however
short, is satis - Secus if y same gives him y Estate
transfers it to y^{an} other, as where land is granted to A by a
fine and rendered back by y same fine. 2 Bl. 132. Co L. 615.
Co Litt 35. 2 Co 67.

And in Eng if y husband alien y land during coverture -
tis still subject to Dower of y wife. Co Litt 32. 2 Bl 132.
The husband can by no sole act of his exclude y wife's
right of Dower - So in N.Y. and Mass.

Secus in Conn she has dower only in those lands of wh y
husband dies seized in fact or law. St Conn 239.

In Eng, y wife is not entitled to dower in y husband's
equity of redemption - or mortgage in fee - 18. on such a
mortgage of by y husband before marriage considered as
analogous to y full Trust 2 Co. 294

aliter if made after marriage. Then indeed she can't
 strictly be said to have dower in y Equity of redemption. —
 The rule will hold to y exclusion to y mortgagor, a tenant
 in y Equity of redemption not entitle him to dower only post
 redeeming of land. Pow 321. 3. 2 Bac 123. 5. ibid 403. 1. atk
 666. 3 P Wms 229. 1. Talbot 138. 2 atk, 525. 1. 186. 138. 161.
 1. Bro. C 326 Contra 2. P Wms 100. 1

and yet y husband is entitled to Curtesy in a parallel
 case, of a mortgage of wife's land. ante 32.

The rule was established when y wife of y Mortgagee was
 supposed to be entitled to Dower. P Wms 335. 6. 2 Bl 158.
 Cr C 190. Hard. 466.

In Com. and N.Y. she is entitled to dower in y husband's
 Equity of redemption. 1. Com. C. 559. 6. John 290. 7. John 278.

And in Eng y wife of y Mortgagor has dower in y reversion
 expectant, or her husband's mortgage for life or for yrs
 made before marriage. Pow Mort 329. 21. 2 Vern 453. Mod
 82. Prec. Chy 133.

A Dower by common Law must be assigned to y widow
 by y husband's heir or guardian, for he becomes tenant of y
 whole by entry and y widow is in y nature of undertenant
 to y heir. 2. Bl. 135. 6. Co Litt 34. 5.

If y heir or guardian don't assign, or assign it unfairly,
 she has her remedy at Law and y Sheriff is appointed to
 assign it. 2. Bl 136. Co Litt 34. 5.

The Ct
 of Probate
 assigns

Dower is barred in Eng 1. by elopement with an adulter, Dower
 in y husband be voluntarily received to her. By St Westminster and
 11. 11. 2. By total divorce. 3. by being an alien 4th by an appeal
 detaining Little Deeds from y heir 18. till she sha restore
 ym — and 5th by St of Gloucester (ibid. 1.) by aliening y
 land — 2 Bl 186. Co Litt 39. ties it
higher —
t

So by joining y husband in levying a fine or suffering a

a recovery of his land during coverture. 2 P. 137

First y wife is not barred of dower by y husband's treason in y country. N. P. cons. art 3. Sec. 3. ante 34.

She may be barred here as well as in Eng by Jointure -
vide 2 P. 137. 7. (Baron et Femme)

All Estates for life are legal or conventional are forfeitable not only by treason - felony &c. at C. L. - but also by waste - and by alienation in fee - in tail - or for y life of another. 2 P. 156. Chris notes -

Estates less ym Freehold.

These are of 3 kinds - for yrs. at will - and by sufferance
2 P. 140

I An Estate for yrs is an Estate in lands &c. or a contract for y possession of land &c. for some determinate period, as for 20 yrs. So for one year - Even an estate for 3 mts - or weeks, is classed among Estates for yrs - a year being y shortest term - of any y law on y subject takes notice - 2 P. 140 - Litt. j. 56. 65 -
He who creates y estate is called Lessor - The tenant y Lessee - 2 P. 140 - Litt. j. 57 -

By a year in law is meant a calendar or solar year,

By a month at law is meant ~~is~~ a lunar month -
Secus in Merchant -

So weeks mts mean 48 weeks, but a Merchant mts means a calendar year. 2 P. 141 c. 6. 61.

And in general y law takes notice of y practice of a day.

A day is generally considered as y 'primulum' (first) of mathematics - an indivisible point of time. 2 P. 141. c. Litt. 135.

Incidentally y lessors interest might be displaced by a common recovery, suffered by y tenant of y freehold - Secus now by

At 2. Nov 8th 3 Bb 142. Co Litt 46.

31

Every Estate wh^{ch} must expire by its limitation, at a fixed period, is an Estate for yrs. Hence it is frequently called a term, its duration being limited - 2 Bb 143. Co Litt 45.

'Tis said it must have a certain beginning and certain end. Co Litt 45. 2 Bb 143. This is true - But it must have a certain beginning of course, for if no day is named for its commencement, it begins from y making or delivery of y Lease. Ibid. at Co Litt 46.

And as to its duration, "id certum est quod potest reddi certum" Hence a lease for so many yrs, as "I.P. shall name" is a good lease for yrs - if I.P. names y number 2 Bb. 143. 660. 35.

But a lease for so many yrs as I.P. shall live - is void, for y duration is not certain, nor capable of being made certain, while y lease continues - 'Tis not an Estate for life - for there is no livery of Seisin - and besides 'tis not so intended - 2 Bb. 143. Co Litt 45.

But a lease for 20 yrs. if I live so long. is good, for there is a certain fixed period beyond wh^{ch} it can't pass, tho' it may determine sooner - This is indeed a lease for 20 yrs - defeasible - Post 41. 2 Bb. 143. Co Litt 45.

Every Lease for yrs is but a chattel interest. A lease for 1000 yrs. is but a personal estate and inferior in law, tho' in reality not more valuable yⁿ a freehold for life. 3 Bb. 143. Co Litt 46.

Hence Livery of Seisin is not necessary to create and transfer it - Of course it may be made to commence in futuro - Pecus of a Freehold - for y^t can be created only by present delivery of Seisin - & livery of Seisin operated in present - and transfers y estate immediately - 5 Co 94. 2 Bb 143-4.

Hence a lessee for yrs is not said to be seised

for Lessee is possession of y free hold or land itself, but possession
 12. of y term or chattel interest, but not of y land. 2 Bb 144
 Co Litt 46. For y word term is used to signify not
 only y time or duration of y lease - but y Estate or interest
 of y Lessee - Hence y term is sometimes said to expire before
 y expiration of y time fixed - 2 Bb 144

Thus if a lease is made to A for 3 yrs and after y
 expiration of y term to B et A forfeits it at y end of 1. yr.
 B's remainder takes effect immediately. So as if y remainder
 was limited after y expiration of 3 yrs. 2 Bb 144,

A tenant for yrs is restrained by Special agreement.
 has y same estovers as a tenant for life - 2 Bb 144. 122-
 135. Co Litt 45. ante 26.

As to emblemts. if y Estate determine at a certain time -
 fixed between sowing and harvest, he is not entitled to ym -
 1st Lease from June 8th 1800 to June 8th 1810. for he knows when
 he took y lease. y time of its expiration - 2 Bb. 145. Co Litt 7.
 68. So as if y lease is defeasible on a contingency before y
 expiration of y period limited. as Lease for 20. yrs. by a tenant
 for life, who dies within y period. Lease by a husband in
 right of his wife, and y husband dies before y expiration of y number
 of yrs for wh y lease was made 2 Bb 145. Co Litt 56. ante 39.
 But if determined by y act of Lessee y rule apply-
 as by forfeiture 2 Bb 145. Co Litt 55. Post 43.

II An Estate at Will. is defined to be
 one held at y will of Lessor. 12. determinable at his pleasure -
 2 Bb 145. Co Litt 7 68.

It is however determinable at y pleasure of either party -
 2 Bb. 145. Co Litt 55. 2d Ray. 707. 1008. Litt 5. 68.

The Lessee has no certain indefeasible Estate for any period,
 as y Lessor may determine it when he pleases, But if y Lessor
 determine ^{inter} before y time of sowing and harvest, the Lessee has

has y emblemts. 2 Blb. 145-6. Co Litt 56.

Secus if determined by y Lessee's act, 2 Blb 146, Co Litt 58, under 27. 41. The estate may be determined by y express declaration of y Lessor, yt y Lessee shall hold no longer, wh must be made on y land or notice of it, must be given to y Lessee 2 Blb. 146, Co Litt 58. 1. Vent 248.

So

So by y Lessor exercising any act of ownership, as entering and cutting timbers, or by any act inconsistent with y Lessee's possession and quiet enjoyment. 2 Blb 146 Co Litt 55.

So by taking a distress and impounding on y land. 2 Blb 146. Co Litt 57. So by his making a feofment or lease to commence immediately. 2 Blb 146. 1. Roll 860. 2 Lev 88.

So by y Lessee's assigning his interest or committing waste. 2 Blb. 146. Co Litt 55.

So by y death or outlawry of either party. 2 Blb. 146. Co Litt 52. If y lessor determine y estate, y lessee has y right of reasonable egress and ingress to take away his effects, and y right is absolute. 2 Blb 147. Litt J. 69.

If rent is payable quarterly, and y lessee determine y estate - he is bound to pay y rent to y end of y current quarter.

Secus if y Lessor determine it. 2 Blb 147. Palk 414. 1. Pid 339.

But of late what were olim called estates at will, have been construed as tenancies from year to year - so long as both y parties please. especially if an annual rent is reserved. 2 Blb 147. 8 T.R. 3. Esp 460. 2 Blb. 1172.

These are now so considered in all cases - it seems 2 Blb. 145. 6. n. Esp 460. Burr 609.

The case of a Mortgagor in possession may be considered as an Exception to y general Rule - for y mortgagor in possession is quod y right of possession, quasi tenant at will to y Mortgagee. But y is not properly an exception, for he never was a tenant at will. Mort 17.

Tenants at will, are now tenants from year to year.

6 mths is y least
period, of notice
6 mths is y
least period
of notice

The death of either
party of a tenancy at
will, ends y relation
with notice
without notice

The difference between these and strict tenancies at will,
is. y former can't determine at y pleasure of either party mi at y
end of y yr or year - nor then without reasonable notice to y
other, wh is generally determined to be half a year - 2 Pp 147.
1. TR 159. 163. 2 Bro Ch. 181. 8 TR. 3. Esp 460. 4. 2 TR 436.
7. ibid 64. 85. 4 ibid 361.

dies

Now tho' either of y parties, notice is still necessary (as, Lessor
dies - his heir if he wd determine, y lease, must give notice
2 Pp. 147. 9. note - 2 TR 159. 3 Mils 825. Post 47.

So notice to y heir of y Lessor, or executor of Lessor, is
necessary. (in y last case) if y other party wd determine
y lease - 3 Mils 25. 2 Pp 149. n.

By y Eng St of frauds and perjuries, it is enacted yt lease
leases for a longer term ym 3 yrs, shall enure only as leases
at will. 1 Bac Abr. C. 72.

But these are held now to be tenancies from year to year.
Estates at will therefor strictly speaking can be hardly
said to exist. 8. TR 3. 2 Pp 145. n. Esp 460.

Burr 1699. Notice to quit at any other time ym y
end of y year. is not good. 1 TR 15.

If
if notice is given
to quit ante y end
of the yr it will
have no effect
whatsoever

But y time intended for quitting in y notice will be presumed
to be y end of y year, unless y contrary appears, as when y notice
is merely to quit. 2 Pp. 147. n. 1. TR. 159.

If after notice by a landlord he receives rent accrued
after y years end, he waives y notice and confirms y tenancy -
2 Pp. 148. n. 6 TR. 219. 1. 4 B 311

but
but if tenant
denies y landlords
title he can't p
st. want of
notice - quia
his holding over
after proper notice
to quit, is a tacit
avowal of title and
y plea implies
merely yt he is
a tenant -

If notice is not good, for y year, in wh it is given,
it is not for y next, it being presumed as to y latter
year - The Tenant is never obliged mi at y time,
if y time is specified, nor is y notice good for a subsequent
year, for it don't point out yt year. 2 Pp 147. n 2 -
2 B Chy 161.

merely yt he is a Tenant.

If there be a Lease for a yr and y lessee continue in possession after y year, with y lessors consent, he is considered as Tenant for another yr. The consent is a tacit agreement to renew y lease on y original terms. 1 Pl 162 - 1 Pow C. 135-258, Contracts 45-

In yo case notice is necessary (ant Supra) 1. Pl 162-

Estates at Sufferance

If one come into possession of land by lawful title, and afterwards keeps it witht any title, he is called tenant at sufferance. As Lease to A for a year and after y end of y year, A continues to hold witht leave. 2 Pl 150. Co Litt 5^r.

So olim if a lease at will was made to A, and on y lessors Death of Lessor, A continued in possession witht leave, he was tenant at sufferance 2 Pl 150. Co Litt 5^r.

y tenant from yr to yr. a tenant at Sufferance -

But now Estates at will being treated as tenancies from yr. to yr. if y lessor dies, y lessee is entitled to half a year's notice (in Eng) to quit. 2 Pl 150.

Death of Lessor don't make a Tenant from yr to yr a Tenant at Sufferance

This Estate may be determined at any time by y entry of y true owner. But before entry he can't maintain trespass vs y tenant - for possession is presumed lawful, in y lessor by some public act, as Entry declares it to be unlawful Ibid. 5 mod 384.

In Eng then y Landlord to recover possession, must actually enter and bring ejectment 2 Pl 157.

But Its 4. Geo. III. and 11. Geo II. have nearly ended yo species of tenancy. If a Lessee for a term certain hold over witht leave, it is not necessary for y landlord to give him any notice to quit - He is not a tenant from year to year but in nature of Forfeiture ante 47. 1.

5 Pl. 53. 162

Estates in Possession, Reversion and Remainder

Estates have been considered ante with regard to y quantity of interest in y owner. They are now to be considered with regard to y time of yr enjoyment. Estates under y view of y Subject are divided into Estates in possession and those in Expectancy.

As between y dispossessor and dispossesee, Expectancies are of 2 sorts. The created by y act of y parties called a remainder and y other by act of law called a y devised is not reversion. II

in actually in possession of Estates in possession there is no need of any definition. but as to all other y Estates before treated of are of y character. By these a persons y devised present interest passes, not depending on any subsequent is in possession - contingency together with a right of present enjoyment. or at least so considered - These 2 particulars distinguish these from Estates in Expectancy.

II An Estate in remainder is one limited to take effect and after another estate in y same subject, is determined. as Land granted by a tenant in fee to A for yrs and poss y determination of y Estate to B & his heirs - Here takes a an estate in remainder - A takes a particular estate ^B for yrs after y expiration of wh. B vests in possession.

These interests are but one estate equal to one estate in fee only. They are only diff't parts of one whole, or of one inheritance, all y parts being equal to ~~one~~ y whole. 2 Bl. 164. 2 Wils 186.

How

29.

Hence no remainder ^{can} be limited on a fee Simple - for a fee Simple absorbs y whole - interest yt can exist in things real - The tenant in fee has y whole inheritance.

The most proper word to create remainder, is y word remainder itself. How 29. Pow. 242. How 134-10. Bl. has been very erroneous on y title II To create a remainder there must be some particular red with caution estate precedent to y estate in remainder, The former is 59.

is called y Particular Estate. There may indeed be a future state created witht a particular estate preceding, but it will not be a remainder, for a remainder is a relative term implying yt some pt of y thing is disposed of.

Plor Pow 242-

An Estate created to commence at a future time witht - as if a. make any intervening estate, is then no remainder being not a residue of any part of an interest - disposed - 2 Pl 165. to begin one yr a future of But a ^{free} hold can't at C.L. be created to commence hence, tis a future in futuro. It must take effect, i.e. vest immediately in possession Estate but not or remainder - This is made necessary by C.L. mode of not remainder - possessing a free hold - for Livery of Seisin is necessary and ys always operates in present -

Exception in case of free hold rent. Fearn 424) i.e. of a rent can't begin granted de novo Tho' a free hold is a rent in esse - can't in futuro, be granted to commence in futuro - with a particular

The former being newly created, there can't be any precedent state is for right to bring any real action for it and livery is not necessary - 2 reasons -

Another reason and yt wh may be said, forms y object of y State, is to prevent y freehold's being in abeyance (wh wd be to fetter y inheritance) and yt there may always be a tenant to y precipe in a real action, and one to avow feudal services - A tenant to y precipe in a real action must be tenant to y freehold -

As if Tenant in fee cd grant it to commence 20. yrs hence witht an intermediate freehold - there wd be no tenant to y precipe for yt period - ergo no such action cd be brot for it during yt period - for there can be no such thing as a real action fore y freehold vests in y possession -

And there was no mode of recovering a freehold at C.L. yon by a real action, and But a real action can be brot vs no other, yon y tenant of y freehold in possession - Of course if there is no present tenant of y freehold in

234

Fearn 234 -

5 Co 94 -

Ray 151

2 Mils 166 -

2 Woodson 200 -

2 Pl 362 -

2. Woodson 200 -

possession there can be no action bro't during y^e term to recover possession as a wrong done.

The meaning of y^e Rule as applied to y^e creation of estate in remainder is. y^t when a free hold remainder is to be created, y^e immediate free hold must pass - & a free hold must pass immediately from y^e Grantor at y^e creation of y^e Particular Estate.

Not y^t y^e free hold remainder must necessarily pass at y^e time, for in cases of contingent remainders, y^e free hold remainder don't pass at y^e creation of y^e particular estate. Post 12.

Besides Livery of Seisin withth a free hold can't pass, in its nature operates immediately or not at all, for it y^e act of giving present possession of a free hold.

This may be illustrated by 2 examples. - Suppose a feoffmt is made to A in fee, here y^e Livery of Seisin necessarily gives A immediate possession of y^e free hold. - 2. Suppose a grant made to A for yrs, remainder to B in fee, here present possession, i.e. Livery of Seisin must be given to A to support y^e remainder and y^e is construed to be giving Seisin to B, both being one Estate & B is presently seized of his remainder. B's commences in Present to be enjoyed in futuro. - He has a feo present fixed right of future enjoyment.

But y^e reason of y^e Rule has ceased to exist in a great measure. Real actions being almost entirely out of use, and in y^e Mod remedy, (ejectmt) a tenat of y^e free hold not being necessary and Livery of Seisin is now not necessary to pass a free hold.

A Lease at will is not satis to support a remainder, 'tis so slender and precarious an Estate as not to be deemed part of y^e inheritance. Besides in y^e case of free hold's remainders entry to make livery determines it. Que? how so, as y^e estate at will is to be created at y^e time of y^e Livery.

If y^e particular estate is void in its creation, y^e remainder

2
2 Pl. 167. 6. 9.

2
2 Pl. 167.
2 Cok. 75
Raynd. 151.

Co 75.
Ray 151.

intended ^{to} be engrafted ~~me~~ upon it, must fail, 18. remainder
as such - If created by device it may take effect as an
executory devise for there is no particular Estate, Thus 2 Modson
Suppose an Estate for life was limited to one not in Esse - 179. n
remainder in fee. y^s remainder in fee is void - Plow 4. 4 -

2 Roll 415. Co Litt 298. 2 Pl. 167.

But under a device to one not in Esse, for life, remainder
to another, y latter will take y land, tho' not as a remainder -
Post 12. 27. 6.

And in General if y particular estate, tho' good in its creation -
if defeated post y remainder it is said must fail, Quere as to 2 Pl. 167.
vested remainders, ne defeated & in a way wh avoids it by relation
ab initio. As an Estate limited to A for life, defeasible on
y breach of some condition, with remainder to B. in fee, if A
forfeits his estate by y nonperformance of y condition, and y Grantor
enter for y breach of it, y remainder over is defeated and y Estate
vests in y Grantor, for post it is defeated, there is no particular
estate - I C takes y reason in vested remainders to be,
yt if y Grantors entry for y breach of y condition avoids y
particular Estate ab initio and destroys y livery of Seisin made 2 Modson, 180. 6. 7.
originally to A. and therefore in contemplation of Law, there 2 Pl. 155. 6.
is and has been no particular estate - 171. 69 -

The Rule seems to be laid down by Pl. too generally -
Post 13. 209
234-44-61-
241-

This Rule don't apply generally to vested remainders, it
seems - As Suppose an Estate limited to A for life with an
conditional remainder in fee to B. and A forfeits y estate
during life by an act of treason or surrenders it - There y
forfeiture enures to y remainder, It don't defeat but accelerates
y remainder of B. wh takes effect immediately even during
y life of A -

Tho' as y remainder depends on y livery of Seisin made to
y particular tenant; As yt is defeated by y Grantors entry
for a condition broken, y remainder fails - Post 13. 26. 7.

Sed quere, does not y rule suppose y particular estate to be avoided ab initio?

The Rule as first laid down has at first perhaps perplexed our students. What then is y true distinction? It is, that one merely by inference from acknowledged cases. In regard to vested remainders, if y rule is, that if y particular Estate for life is defeated during y tenant's life by any act wh avoids it ab initio then y freeholder ^{limited} upon it, must fail, for it is then, as if ^{there} it had never been any antecedent particular Estate. But when y life estate is defeated by any thing wh does not avoid it ab initio, but merely terminates it from y time of y act done, in such case y remainder is not defeated but accelerated.

With regard to contingent remainders, y rule in *Pl. B.* is universally true, as an Estate is limited to A for life with remainder to the first (unborn) son of A and A forfeits y estate before B has a son, y remainder must fail, for there is a chasm between y termination of y particular Estate and y beginning of y remainder, during wh there wd no person in whom y freehold vested.

II. Rule.—The Remainder must commence or pass out of y Grantor at y time of creating of y particular Estate i.e. y absolute or contingent right in remainder must be created at y time as. 1. If a limitation is made for life, remainder unconditionally in fee to B. Here B's remainder passes by y delivery of Possn to A — and is vested (in interest) immediately.

2 Mod. 177

Co. Litt 49

Per

Per F. 2423.

2 Pl. 107. n

Litt. S. 6. 71.

Litt

I Suppose a limitation to A for life, remainder to B in fee on a certain contingency — as when he shall attain y age of 21. Here B's right to enjoy y Estate, or y contingency commences instantan the his interest don't vest till y contingency happens — The interest thus limited to B. in y last case remains in y Grantor, ergo till y contingency happens, and don't lie in allegiance as *Pl. B.* supposes — 2 *Pl. B.* 167...

A Remainder cannot be limited on any State already in esse before created. Such a limitation wd be a grant of a reversion. Both must be created by y same instrument or act. Thus suppose A being seised in fee conveys to day an estate for life or yrs to B. and a month hence conveys all y residue of his estate to C. This limitation to C is not a remainder but a reversion. A remainder is a residuary interest limited on a particular estate created at y same time.

II The Remainder must vest in interest in y Grantee during y continuance of y particular State or so instantly yt it determines. Secus it never takes effect as a remainder, quia if y particular estate determines at one time and y remainder can't vest till another, then during y^s time, there is no particular State - but a remainder can't exist one moment without a particular State. As Suppose a limitation to A for life, remainder to B in fee - the remainder vests in interest at y creation and in possession on y determination of y particular estate; again to A for life remainder to y first (unborn) son of B. or y birth of B's son (a living) it vests in interest and in possession on y expiration of A's life Estate - To A and B for y^r joint lives, remainder in fee to y survivor, it vests in interest and possession on y death of either.

E Contra Suppose y remainder in fee is to B unborn and y particular tenant dies before B is born, it fails as a remainder -

2. Bro. 168-

Pow. on Dev

242. 2 Pl 16

But such a limitation over by devise may take effect as an executory device. Post 18. 30. 1. for being but an Estate they must be in Esse together - y support fails

1. Co. 68. 138.

3 Co 21.

2 Mod. 179.

On A's death y particular State ceases, ergo there can be no remainder Post 27.

233. 4. Fosse 25.

2. Mod. 180-

So if a grant is made to A for life remainder in fee to B. to take effect 2 days after A's death, y remainder is void in its creation - for during yt interval there can be no particular State from y very terms of y limitation - Pow. 25. Fosse 234.

On y last Rule chiefly y doctrine of contingent remainders is founded -

Remainders are of 2 kinds, vested and con-
 -tingent- is one
 A vested Estate, of wh there is a present, fixed right of
 present or future enjoyment. An Estate vested in possession is
 one of wh there is a right of present enjoyment. This is what
 is called an Estate in possession. An Estate vested in interest
 only, is one of wh there is a present fixed right of future
 enjoyment. Of y's description is a vested remainder.

Fearn 1.2.

A Contingent State is one wh is to accrue upon some
 future uncertain event, and of wh there is no certain ^{fixed} right of
 present or future enjoyment, but only a contingent right
 of future enjoyment. Such is a contingent remainder. As to A for
 State is one of life - remainder to B's unborn son or to B on his marriage -
 sp. there is

Contingt rights Vested remainders are those by wh a present interest passes
 future enjoyment to y Grantee to be enjoyed in future - the interest is vested -
 a 18. there is a present fixed right of future enjoyment -
 vested State, As to A for yrs, remainder to B in fee. Here y remainder
 with any adjunct, is vested in interest at y creation of y particular State -
 means an State tho' to be enjoyed, 18. to vest in possession in future -
 vested in interest.

By a vested Remainder then is meant one vested in interest
 only - for as soon as it vests in possession, it ceases to be a
 remainder and becomes an State in possession.

Contingent or executory remainders are those by wh no
 present, fixed interest passes - to y remainder man, but wh
 are to vest an interest upon a contingent or uncertain event.

Fearn 238. As to A for life, remainder to B. if he returns
 from India before A's death - or remainder to y first
 unborn son of B. 2 Ph. 169. 70. 3 Co 20. 3 Andes. 191. 2-4.

In y former of these cases, y remainder vests
 in interest on B's return during A's life - In y former latter
 it vests on y subsequent birth of B's son - during A's State.

Salk 228.
 4 mod 282.

In each case if y remainder vests in interest during y

continuance of y particular Estate, it will vest in possession when yt Estate determines. But in each case if y remainder does not vest in interest, while y particular Estate continues, or co instante yt it determines- it can never vest in possession. 18. it must fail, as if y contingency does not happen till after y determination of y particular Estate. And by y C Law if y remainder were limited to y ~~old~~ eldest son. of even y particular tenants his son in ventre sa mere at y time of his death, cd not take. Supposed not to be in Esse. But y evil is remedied in favour of posthumous children- by St 11 10. 11m. 32. This St enables children in ventre sa mere to take in remainder, as if born in their father's lifetime. 2 Wodes. 200. 4 Mod. 282. 2 Bb. 169

Salk 228.

A Remainder to a person not in being must be limited to one who may by common possibility be in esse at or before y determination of y particular Estate. 169. 70. 2 Bb 169. 1. Pecus y remainder is void, Feane 175 in its inception. If then an Estate is limited to A for life with remainder to y heirs of B. B being himself in Esse, y is a good contingent remainder, for B's dying before A is deemed but a common possibility -- potentia propinqua. 2 Co 51. Co Litt. 264. 378. 264.

Note in y case, "heirs" is a word of purchase 18. descriptio personae. meaning y person who shall be y heir of B at his death.

But a remainder to y heirs of B. he being unborn- at y time is void. The contingency is a remote possibility. 18. there must be 2 contingencies happen, first yt such a person as B shall be born- and secondly yt he shall also die during y continuance of y particular Estate, wh makes it "potentia remotissima" a most improbable possibility. Co. 84. 5 2 Bb. 170. 2 Hobert 33. 33-

So a remainder to A y unborn son of B. is void, here are 2 possibilities, y one depending on y other- for it cd never vest in B shd have a son and shd name him A. 2 Co. 51. Feane. 177.

The remainder to y eldest son of A unborn is good. 2 Bb. 170. Feane. 177.

(Remainder limited upon y happening of an thing

unlawful is not good. y reason assigned is, yt it is limited on a remote possibility. The reason is, says, is yt it is opposed to good policy wh prevent any person from acquiring a right through an unlawful act. On y principle, a remainder to an unborn person, is void. The Law bears hardly upon such children from consideration nearly public. Cro. E. 509. & 2 Co 51. Tearn 175. Bl. 170.

A Limitation on failure of limitation is not of course and necessarily contingent. Post 26. ante 6.

A Contingent remainder of freehold can't be limited on an estate less y freehold. for to create a free hold remainder, a freehold must pass from y Grantor at y creation of y Estate ante 4. and it must rest somewhere, but it can't then rest in y remainder man. for no present interest passes to him, ante 4. ergo it must rest in y particular tenant, Hence by a limitation to A for yrs, remainder on contingency to B. if in fee y remainder to B is void. 2 Bl. 171. 1 Co 130. Ray 151.

2 Modes. 149.

If a Devise is made to A et B for yr lives and y life of y survivor, but if B marries and has issue, then after A's death to B and his heirs. and if B dies with issue, to A and his heirs, A et B take a joint estate for life, with contingent remainders in fee to each in y alternative.

How defeated.

all Contingent Remainders may be defeated by determining y particular y particular Estate before y contingency on wh y remainder rests is to happen. As death, alienation in fee, or surrender by y particular tenant before y contingency happens. 1 Co. 66. 135

Tearn 241. to 44. 48. 52. 54. 58. 62. 70. 72. 2 Tearn. 39. 2 Bl 171.

A Contingent remainder may be barred by fine or common recovery by y tenant for life for as y particular Estate is destroyed by y fine or recovery, y remainder depending upon it, being contingent, fails. ante 6.

But ^{vested} contingent remainder can't be barred by recovery.

So if y recovery is suffered to y use of himself. Talk 234. for tho' he hold y estate under y recovery, tis not y Estate he formerly held - that is annihilated. Focus if vested.

1 Co 66. Cro E 630. Talk 224 2 Bl 171. n. 2 Mod. 186. 7.

But ~~if~~ y determination of y particular tenant ^{to} actual seisin ^{disseisin} 45
before y ^{contingency happens} ~~seisin~~ don't of course defeat y contingent remainder, for
tho' he is disseised, yet if he retains a right of Entry, y remainder
is supported - for he is seised in Law and his Estate of course continues -

Ad suppose y particular tenant is disseised and dies so. before
his right of entry is barred, and y contingency happens between those 2
events, y remainder is good - But if he was disseised tenant is
20 yrs, before y contingency, y remainder it seems, is void - ^{disseised. still}
2 Mod 196. 99. 12 Mod 174. 2d Ray 316. 1. C. 66. 7. ^{is seised in la}

From y liability of contingent remainders to be defeated, arose still he is
y necessity of appointing trustees to preserve contingent remainders ^{seisin in}
invented during y civil wars to prevent a destruction of y ^{law -}
particular State by forfeiture - As in y^s form. a limitation to
a for life, remainder to B during y life of A - remainder to C.
unborn. If A shd forfeit, B's remainder wd vest and continue
till A's death, when C. if born wd take - Co Litt 378. 5 C. 57.

2 Bb. 172. 1. Hobert 33. 2 Atk 246. 5 W. 77. Teame 84. 87. 8. 95. 120. 123. 152. 7.

The Question an (S) remainder is vested or contingent depends
upon y nature of y limitation I.E. upon its being limited absolutely
or on a contingency, not of course on y probability or improbability
of its actual taking effect in possession, as Suppose a grant
is made to A. in tail, remainder to B for life - This is a vested
remainder -

It wd be so tho' B at y time where ever so old and tho' had
a numerous posterity, for it is limited absolutely on no contingency
or condition - It is ergo a present interest to be enjoyed in ^{he} futuro -

So if an Estate is limited to A and ^{he} he dies without heirs
of his body to B. y^s is a vested remainder, for if he dies E.B.
don't import a condition precedent to y vesting of B's
remainder, but only of y quantity of y interest in A. It is
Sandamont to limitation to A and y heirs of his body -

30
Hobert 30.
3. Park 233.
4. 5
Mod 182. 4. 5
192. 3 Bb 48.
x-488
-9-

It is y uncertainty an a remainder will ever vest ~~or not~~
(in interest) not an it will take effect in possession, with 2 Mod. 192.
renders a remainder contingent, thus tho' in a grant to A Peame 147

for life, remainder to B in tail, y remainder is vested yet
 one tis to A for life, y remainder to B in ^{tail} case B survives A. it is contingent.
 2 Bb 107. or 70.

The present capacity of taking effect in possession, if y possession
 were vacant, (y facts being secus yn they are) is y universal
 criterion wh distinguishes a vested remainder from a contingent
 one. Thus if A Grant is made to A for life, remainder to
 B in tail, y remainder is vested (ut supra) quia if you
 suppose a forfeiture by A immediately after y grant, or yt his
 State were by any means determined during his own life, B ^{ed}
 take possession of his remainder statim. But if y remainder
 is limited, in case. B survives A, it is contingent -
 quia shd y particular State be forfeited, or determined in
 any manner during y life of A B's remainder ^{ed} not take
 effect in possession, since he is not to take, ni he survive
 A. Devises 72

Now. 31. 2. If an Estate be limited to 2- with remainder in one event.
 to one of ym G and in another Event to y other, these latter limitations
 are called cross remainders.

Bacon
 Title
 Remainder

It has been sd. yt cross remainders can't arise between
 more yn 2- The Rule is, yt when cross remainders are to be
 raised by implication - between 2 only, y presumption is in
 favour of ym - IE. y construction is in favour of ym - Secus
 if there are more yn more 2- Cro. J. 665. Bacon 333.

Now
 780. 31.
 2. East 36. 40.
 East 36. 40.

But y presumption may be ~~for~~ rebutted by circumstance
 of manifest intention either way.

1 East 229
 Cow 797

It's said yt cross remainders can't be created by deed -
 this ant law. y Rule is, they can't be raised by implication
 in a deed, but must be expressly limited.

4 Bac 333. 1. East 416.

In a devise they may be raised by implication as a devise
 to A et B for y^r joint lives - remainder to D in fee -
 it has been supposed if they both die wth issue here A et B take cross-
 in Cont. yt a first remainder in tail by implication - for there is no
 could pass in future express limitation to y^r issue - Secus if by deed -
 by a Com. St. sed non sic - 1. Day 300. n.
 by a Com. St.

Executory Devises

There is a species of Expectancy wh is not strictly a remainder,
tho' of similar nature and wh is called Executory Devise —
2 Bl 172.

The Term Executory Devise is sometimes used to signify y interest
limited and sometimes to signify y disposition or manner, in wh
it is created 2 Bl. 172.

'Tis generally defined to be a ~~future~~ devise of a future 'state
not ^{to} take effect on y testator's death, but on some
future contingency. This as a definition is clearly illegal —
for it plainly includes as well contingent remainders, as
executory devises — 'Tis true y't an executory devise will answer
ys description — but a contingent remainder will answer y
same description — A Remainder may be created as well
by devise as by deed — 2 Bl 172. 1 Equity Cas. 186. Fearne 298.

The description now adopted is ys — an executory devise or
bequest is such a limitation of a future Estate by will, as
y law admits in wills, but not in C Law conveyances, as
deeds. This however is a description refering only to a
collateral test. it can't be said y't it is a logical
description — it describes it only by its characteristic incidents.

3 T R. 487. Cowp 234.

Fearne 295. 7. 8. 303. 2 Saund 388.

It follows from y description y't if such a limitation of future
interest, wd be good by way of contingent remainder — by
Deed — it is not an Executory devise, but a contingent remainder —
for executory devises are allowed wholly for giving effect
to uncertain instrumts, wh can't be made to take effect at
C Law —

Fearne 299. 302. Carth 310. Douglass 729-4 Mod 258

If one Devise to A for life, with remainder to B. or 2 Mod 222, 3.
on any future contingency, y limitation to B. is not an
Executory devise — quia it might have been made by
deed and have been good

Executory Devises are of comparatively
mod, origin, they originated in y reign of Eliz — and were never ante hem
heard of

But it may be asked, how y^e new species of Estate or remainders
Devises were sh^d ever have grown - They are allowed merely out of indulgence
long before to a Man's last will, and testamt - on indulgence wh^{ch} never-
theless extends to Deeds - Pow. Dev. 200, 2 Bb. 172. Feame 299. 2 Mod 221.

Feame 43.5. As regards y^e mode of its creation, an executory Devise differs
from a contingent remainder in these particulars -

II That by way of executory devise a freehold may pass or
potius be created to commence in futuro - with any preceding
particular support arising from a particular State -

III That by an executory devise a fee Simple or any other
State may be limited after a p^{re}vious residue in some future con-
tingency - It's more correct to say, one tenant may be substituted
for another, for no 2 feesimples can exist at y^e same time -
Neither of these things c^d be done by deed, or other C^o Law
assurance -

IIIth By such a devise a remainder, may be limited of a
chattel interest after a life State in y^e same subject -

This is impossible at C^o Law - All these limitations in C^o Law
assurances are utterly void ab initio -

Pow. Dev. 250.38, 2 Bb 173. 398. Feame 303.4. Salk 229. 10 Mod 420, Pow. D. 238. 50.

If A Contingent Remainder is made by devise to depend on
a previous freehold capable of supporting it as a remainder -
and if y^e previous Estate fails ^{before} after y^e testator's death by y^e death
Feame 401 - of y^e first Devisee - y^e second limitation will enure ^{as} an Executory
418.19.20 - Devise, tho' in its creation it was an remainder, a contingent
Talbot 44 - one, for there is a previous particular State capable of supporting
Doug 325.476 a remainder - There you perceive what was in its nature -
n.1 - a contingent remainder becomes an Executory Devise -

As a devise is made to A. for life, remainder to y^e first
Olin Contr - unborn son of B - Now y^e is a good contingent remainder -
quod if A. dies - in y^e lifetime of y^e testator - y^e testator then -
12. Mod 125. dies - B then has a son - now y^e son will take y^e remainder
Feame, 401. as an executory Devise - and he can't take it as a contingent
remainder - for y^e death of A before y^e testator has annihilated y^e
particular freehold, so y^e it can't support a freehold -
contingent remainder.

On what principle? At y testator's death a being before dead,
 y limitation to B's unborn son, is as y limitation of a future interest,
 to B's unborn son now in y different mood.

The first Rule is, yt by way of Executory devise a freehold may
 be created its commencement in futuro, witht any particular State to
 support: Thus a man may devise an Estate to A in fee, to commence
 on y day of his marriage, tho' A is an infant and is a good executor;
 Devise - "Now it wd not be good by deed at all, quia a
 freehold to commence in futuro, witht a particular State can't be
 transferred witht livery of Seisin wh always operates in present.

To a devise in fee to A (not having heirs) when he shall have
 heirs, is good as an executory devise and even if A at y death of
 y Testator, A has no heir on A's death his heir at law will take
 y Estate. Now in y Example I have given y fee simple on y
 death of Testator descends to his heir at Law - liable to be divested
 on A's death in favour of y devisee whenever y contingency happens.

2 Mod 233-
 233-

Feame 303.4. 2 Bl. 173. Salk 226. 29. 1 Equity cas. 188. Bro D. 255.

When y devise is to y first unborn son of A and y testator dies
 before he has a son, y estate descends statim to y testator's heir.

But y moment a son is born, y testator's heir is statim divested. D. Will 505-

Doug 481. n. 44. Hodgeson. 233. Doug 481. n. P 505. Mod 233.

505-

Second Rule - That by an executory devise a fee or some
 other State may on some future contingency be limited after
 a Prior Fee simple, or one fee simple may be substituted for another
 or one tenant in fee simple may be substituted for another.

Thus a devise may be made to A and his heirs, but if A
 shall die before y age of 21 to B and his heirs. Such a limitation
 by Deed is impossible, for y first fee limits absolutely, y whole
 interest there can possibly be in y land. The first of y 2 -
 must be defeated by y 2d. It's y substitution of one fee simple
 for another.

2 Mod 289.
 Salk 229.
 Feame 303 -
 2 Bl. 173. 398.
 2 Mod. 181 -
 1. Equ Cas 360.

Again if one devise to A and his heirs, proviso yt if B pay
 such a sum to A by such a time, yt y land shall go to

Fearn 416.

Pow. D. 250. 51

to B and his heirs, y last limitation is a good devise to B
tho' y^o wd be void in a Deed -- in y ~~se~~ case now supposed
10 Mca 420. y 2^d state is not to take effect after y first fee simple, but
as a substitution.

Rule 3^d That by an executory devise y
remainder in a chattel interest after a life State may be
limited -- This at C.L. is impossible -- for a disposal of a chattel for
life is an absolute interest in it forever -- and if a term for 1000.
yrs is leased for life it conveys y whole term at C.Law.

If at C.Law one shall give a bill of sale of a ^{wach} ~~wach~~ or other
chattel for life, it wd convey an absolute title -- But if F.F.
having a ^{term} transfer for yrs, devises it to A for life, remainder
to B -- B after A's death will take y whole residue interest
of y term, and hold it to him and his heirs till it expires.

2 Mod. 288. 9 2 St. 174. 8 Co. 95.

And such a limitation may be made not only on a term for yrs
but in any chattel wh is not perishable -- as plate -- Jewels --

for life

Thus a distinction was taken between a bequest of y use of y chattel
with remainder over, and y chattel itself thus limited with
remainder over -- In y former twas held ^{was good} ~~was good~~ in y latter --

But y^o distinction is now done away and both are good --

6 Bl.

36 says y^t

10 Co 46.

2 St. 174. 398.

Fearn 804 Cro. Ex. 346. 1. 2 Will 1. 8 Co. 95.

all y remainder man

of a chattel must

be in esse during interest

y life of y first

devise, as is

totally wrong --

as F. G says.

2 St. 174. 5.

1. Febrin

451.

7. J. R. 282.

102. 2 P. Will

421. 1. 2. 3.

234. Fearn

324. 1. 55. 6.

3 att. 282.

A chattel interest may be limited to any number of persons --
in being successively for life, with remainder over -- Thus a chattel
in esse during interest may be limited to A. for life, remainder to B for life --
y life of y first and so on -- to L. E. 3. But they must be lives in being or those
y^t precede y ultimate remainder man -- must be lives in being --
The necessity of y^o arises from y Rule. 2 St. 174.

Where y distinction ^{now having been} ~~was good~~ taken between contingent remainders and exe-
cutory devises relate to y mode of y^o creation, rather y^o y
nature of y Estate when created -- Now y essential distinction
between and contingent remainder and executory devises is y^t y
former may be barred or defeated by a fine or recovery levied or
suffered by y particular tenant y^t latter can't be --

2 Br. Chy. 30.

2 St. 175.

E3

Suppose yt P. devises an Estate to A. and his heirs, proviso
yt if B live to y age of 21 yrs. it shall go to B and his heirs -
and before B arrives at y age of 21 A forfeits his estate. This
limitation is good and is not effected by y destruction of y particular
States - 2 Bl. 173. Cro. P. 593. Fearn 306. 13. Cro. Ch. 185.

2 Mod. 227.

Fearn 314.

And a limitation after a dying with issue
generally to a person in Esse for life only may be good as an
Executory Devise - for it must by y terms of it take effect during
his life or not at all

Fearn 314. 2 Bl.

173. 4. Farn

229. 2 Mod

2. Mod 230. 31-

If one devises to A for life, remainder to B in fee, proviso yt if
A's wife has a son born, y land shall go to him in fee - y birth
of a son (ut supra) defeats B's estate, not A's particular Estate
And in Count y words. "if he die with issue" have been
construed according to y ordinary signification - A limitation -
in such an event may ergo be good - as an executory devise, it
seems. Fed Luce¹².

An Executory
Devise to be
good, and valid,
must be so lim-
ited as to take
effect
during some
life or lives in
being, or 21 yrs.

Re But as States limited to one and y heirs of his body or issue, are
1.4- by Court It made absolute - fees in y immediate issue of y donee of additional
will. The C Law Rule may not be fully applicable to cases arising
12 thus. This rule dispences with a great many distinctions -
can Any limitation of a future State by executory devise, or remainder
91.2. tending to perpetuity is void, as if land is devised to A for life -
remainder to his unborn children and so on, y third limitation
is void and all wh follows. No limitation in such a form
can be carried further ym to y unborn children of a person in
Esse - for secus land might be made forever unalienable in
for one life -

post - an
fraction of a
Fearn 314. 18. 20.
56. 7. 100.
595. Doug 590
Salbot 228 -

1. Wil 207. 2 Bl. 174. Fearn 320 -

An devise to
and if he die
with issue -
to B,
is void
for his issue may
never fail -

By a perpetuity is meant a perpetual succession of States
not of inheritance, keeping y ultimate fee forever in abeyance -
Its will however sometimes its effect y general
devises construe y limitation in cases of y kind according to
y doctrine - Bid - as near as may
be by giving y first unborn Devisee an Estate Tail -

52
No limitation
can extend
further y n y
unborn child.
of a person in Est.
to B. C. who
are now living
and to y children
B, they being
now unborn
now in m.

Where a contingent or other Estate is devised over on a condition annexed to a preceding limitation and y preceding Estate never takes effect, y contingent limitation takes place.
As Suppose a devise to A for yrs - remainder to his eldest son in Tail, if he takes y testator's name, and if not, remainder to B, If y son shd not comply with y condition, B will take -
for 4 T.R. 470-78- 1 Ves. 420. Talk 229- 2 H.R. 361.2- 1 B. & P. 250

In y last limitation is a substitute for y preceding Estate, the condition annexed to it, is not a condition precedent, i.e. one wh must happen to give effect to y last, tis merely a precedent estate accompanied with a condition - Fearn. 163.399. 4/5.16-18-

The last limitation is a vested remainder tho' defeasible,
1. B. & P. 250 i.e. y case is y same- as if y limitation were then- to A for yrs. remainder to B in Tail or in fee. proviso y if A's eldest son shall take y testator's name- he shall take in fee on y termination of A's estate for yrs-

To in a devise to A in Tail and for want of Issue to B, if A dies living y testator, B takes station on y testator's death, when (when y devise is consummated) There is no preceding Estate, y devise being lapsed- Doug 323.26. Plow 340- Cro E. 422-
2 Vern. 722-

But it is not so if y preceding Estate was void, through y remoteness of y contingency as. devise of personal property to A. and if he dies without heirs- to B. remainder in contingency to C. C can't take on failure of B's remainder, for as y limitation to B is too remote, y to C is necessarily so-

2 T.R. 245.51- 2 H.R. 362. 1 Ves 134. Fearn 417.18-

2 T.R. 251- 4- So if y subsequent limitations are so made as to depend on y prior, and y prior remainder ^{never} takes effect, y subsequent one must fail for it is then a contingent remainder, wh can never take effect- if there is no particular State- Thus Suppose land devised to A in Tail - remainder to B in fee, if he attain y age of 21. yrs- A dies post y testator's death, but before B attains y age of 21- B's remainder fails- for where y will goes into operation, y limitation of B's remainder depending on y prior Estate in A -

missile

Tested Remainders are transferable, devisable, descendible, and assignable even before y remainderman comes into possession, for such a devise is a present interest - as to y issue, then is no contradiction -

H

And y same rule is settled now in certain cases as to contingent remainders and executory devises in that they are only ^{assignable} ~~devisable~~ 110d, 187, 212.

in Equity. For Equity regards y assignment as an agreement binding conscience and carries it into specific execution and y before y contingency happens i.e. before y interest vests - after y interest vests, tis not contingent - These contingent interests are called possibilities clothed with an interest. Lean 286, 91-439-440.

4 T.R. 248. 1. H.B. 130. 1. Puff 343. Talbot 117. 1. P.R. 422. 605.

But such a contingent interest when it descends, don't necessarily vest in him, who is heir at y time of y death of y remainderman or devisee - but in y person who is heir at y time y contingency happens as a devise to A for life, remainder to B in fee - on a contingency - B dies before y contingency happens - having 2 sons by diff.

208.9.

Puff 205.

44.8.

Lean 44.

2 P.R. 228.

n-228.

y eldest son dies without issue and then y contingency happens - Now y 2^d son of B shall take to y exclusion of y heirs male of y eldest son -

Thus there was a distinction taken between on y subject between an executory devise of Real and Personal Estate -

But not now -

Contingent remainders and Executory devises are not transferable at C Law - by deed, while they remain contingent, since a grant must be of a present interest upon y Gen. principle - y a man can't grant what he hasn't got -

But as soon as they become vested in interest they become transferable at C Law -

But they may be passed away at Law (being of freehold by estoppel - i.e. by fine or recovery) But an executory devise can't be barred - The person entitled must be a party to y fine, &c. in y case of an executory devise The record is then a bar not only to y party but all claiming under him - and in general to all persons -

It is not a devise of y land as a present interest - with covenant of
 seisin &c. by Grantor, y Devisee by his heirs?

4 release
 release is an
 abandonment of a
 right, and not
 a conveyance -

So they may be released at Law to y part owner of y land
 as y heirs of y Devisee, a release being in y nature of a waiver, or
 abandonment of a right, or condition rather yⁿ a Grant -

2 Mod 213. 1. Ves. 411. 11 Mod 152 -

An assignment of such an interest is good in Chy. It will be enforced
 as an agreement in y^t Ct, for if it be an express agreement -

binding in Equity conscience, Equity has ^{no} peculiar
 original jurisdiction over Grants and conveyances as such -

But y assignment must be for a valuable consideration, as for y
 advancement of a child - It will be enforced if purely voluntary
 It must be at least for a consideration in y second degree -

1. Ves 409. 2 Mod 213. 4 Mod. 41. 2 P Wms 608. Fran 440. 42 -

Events happening after y execution of a devise and before y
 consummation of it by y death of y testator, may as before stated -
 vary y limitation from a remainder to an executory devise -

But events happening ~~before~~ ^{post} devisors death, cant generally have
 such an effect, for y will has its operation from y^t event -

Saltot 44. Fran. 401. 19. 20. Doug 326. 5. 47b. n 1 -

Events so happening may however have y same effect, it seems,
 (i.e. an event happening after y testators death) if there is
 a double contingency including a provision for such event -
 So y^t a limitation not in one event has not happened, wd have
 been a remainder, may in another, wh does happen, be construed
 as an executory devise - 2 Ves. 243. 49. Fran 420. Doug 47b -

A Limitation in such cases is called a limitation upon a
 double contingency -

Or upon a contingency witht a double aspect - for its
 operation as an executory devise in one event, is provided for
 by y terms of y limitation - And such a limitation may
 be implied -

If y first limitation is an executory devise, those y^t follow
 are of course, y same, and it is said where y first vests in
 possession, those y^t follow - vest in interest - and become ruled remainders -

As Limitation is made to A in tail on y day of his marriage - remainder to B in fee, B's remainder vests in interest on y day of A's marriage. Doug 478. But y^e don't and can't extend to all cases, as where y subsequent limitation depends upon an Event wh has not happened, when y prior one is vested in possession.

Suppose a devise is made to A in tail, proviso he attain y age of 21 remainder to B in fee, proviso he shall marry and A attain 21. before B is married, B's remainder don't, and can't vest interest, till he marries - It don't then vest in interest when A's vests in possession -

Or suppose y last limitation to a person not in Esse, when y first vests in possession -

Suppose y first limitation to be in possession (as a term for yrs-) y second of a future contingent freehold & on failure of y second, an absolute limitation over. as in Talk 229 is not y last vested, tho' defeasible -

Estates in Reversion

An Estate in Reversion is an Estate left in y Grantor to commence in possession after y determination of some particular Estate granted - by him. As Tenant in fee grants a lease for life or yrs in tail - The Residue of interest continues in him - for neither of these Estates exhaust y fee - 2 Mod 172 - 2 Ab. 175 Co Litt 20.22. B -

The Reversion vests in y Grantor witht any reservation by act of law. for what he don't transfer, remains with him of course - Ibid. 3 Lev 4057.

A Remainder can be created by deed or devise, a reversion only by operation of law - 2 Mod 173 - Hobert 30 - Co Litt 22. B. - 2 Pl. 175. Both are transferable as well at Law as in Equity - when vested being estates in Presenti - to take effect in possession in futuro - 2 Pl. 175.

It seems, yt a contingent reversionary interest, as one to commence on y determination of a base fee - is not transferable 'tis no vested interest, besides there cd be no attornment -

So if a Reversioner shd devise his reversionary interest on contingency the devisee cd not transfer by deed before y contingency hapen.

If one grant an Estate for life or yrs, or in tail with remainder to himself, what he thus limits to himself as a remainder is a Reversion.

So if he grant to A for life, & B. reversion to B and his heirs B has a remainder.

Co Litt 143.
Co Litt 143.

2 Bb. 174. b.
2 Bb. 174. b.

And if Rent is reserved out of y life Estate witht expressly witht appropriating it to any one by name it accrues to y Grantor and not to B. quia Rent is incident to y reversion.

Where Rent is reserved on a lease, it is incident to y reversion.

So yt by a general grant of a reversion, y rent will pass.

3 Len 406.7. Co Litt 321. 2 Bb. 176. 2 Mod 173. 2 Mod 175.

But tis not inseparably incident, for by ^{special} words of Rent, may be granted witht y reversion and y reversion will not pass under a general grant of y Rent - for y reversion is y principal of Rent is but y incident - and y incident passes by a General grant of y principal - but yet it don't hold e converso - Co Litt 150. b. 2. 2 Bb. 176.

By these tis

it was done away -
it was done away.

Tis a Rule of C Law, yt if one makes a lease, y reversion can't be granted away 'till y lessee enters - This is founded on y Gen Doctrine of Attornment - and since y necessity of attornment has ceased y rule must also cease - By St 4.5. of Ann - 11. Geo 2.^d - The doctrine of attornment never was in ys ^{country} - tis of feudal origin -

2 Bb 290.78 -
270 -

By attornment is meant is y accepting a ~~new~~ new landlord by y tenant, for y relation of landlord and tenant cd no more be dissolved by y feudal law, by y act of y Landlord alone, yn y act of y Tenant alone. Neither cd substitute another for himself witht y consent of y other - Co Litt 46. 1. Litt test. 8.5.

A Reversion may be granted by y ^{word} Landlord, as if y grant is of such a piece of land of wh^{ch} y Grantor has y reversion -

10. Co 177. Plow. 480. 2 Mod. 174.

By y C L. a freehold vested reversion cd not be granted

in by fine or deed & attornment, for there ad be no livery of Seisin
it being an expectancy, yet a vested reversion for yrs might be at C Law.
conveyed wth deed, it being a chattel interest, and livery of
Seisin not being necessary to convey or transfer it. 2 Mod 174-

Perkins S. 6. 1. Cro Ch. 143. Litt S. 5. 57.

A devise of a Reversion was always even before y St of 4. et 5 of Ann.
2. Geo 11. good wth attornment, as a devise of any state is wth
livery - for on y reversioner's death there must of course be a change
of Landlord. Perkins 567. 2. Mod. 174-n-

As y whole reversion may be granted away, so it may be devised
and a particular State or States may be created leaving y ultimate
reversion in y Grantor. As reversioner in fee grant for yrs. to
commence from y determination of y subsisting particular State.

So to a for life remainder to B. in tail. here y ultimate
fee still remains in y Grantor. 2 Mod 174. 5-

There may be a reversion as well of a Chattel real as of freehold
interest - as if a Lessee for 50 yrs lease for 20 yrs. he has y
reversion of y remaining 30 yrs. 2 Mod 175. 3 Lev 154, 5
Lev.

The Reversion Expectant or y determination of a fee tail is so
remote in prospect - yt y law deems it of no value - Indeed
y reversion is in the power of y tenant in tail Hence it is -

^{yt}
~~That~~ if y heir at Law of such a reversion is sued on an
obligation of y ancestor, y reversion being y only interest
inherited by him - he may plead ~~by~~ no Assets -
Pow. on ^{host} 443 - 3 P. Mm. 235 -

General Rule, when a greater and a less estate meet in y same
person, in one and y same right, wth any intervening Estate -
y less is annihilated, or merged in y greater. A tenant in fee tail
purchases y reversion in fee, or it descends to him, tis a
virtual surrender of y lesser estate, he ceases to be tenant for
yrs, and becomes ipso facto tenant for life in fee simple

He can't be tenant to himself 3 Lev 437. 2 Co 60. 61.

Cro Eliz 302. 2 R. 178. 7-

But they must meet in one and y same person, and in one and y same right. Thus there is no merger, for if a person is tenant for yrs in one right and purchases y fee simple in another and y less state merged. others wd be injured -

Suppose A has a reversion in his own right and y particular State (as term for yrs) as y Executor of B's y Estate for yrs were to merge in y Estate wh A holds in his own right, so much wd be taken from y State of B's.

So if he has y particular State in right of his wife, as if A a feme sole is tenant for yrs and By reversioner marries her, y Estate is not merged - for if it were on y death of y wife her executor wd have no control over it, and her creditors wd be deprived of so much assets -

Co Litt 338. Cro. P. 275. 2 H. 17.

This is an
exception -

And if an Estate Tail and a reversion in fee meet in one person in one and y same right, there is no merger for a tenant in tail can't destroy y estate in by fine or recovery - nor can he surrender -

To allow a Merger might defeat his issue by other means yⁿ those wh y law requires for y purpose of barring y^r rights - 2 Co. 68. 8. 10 74 - Cro. Elr 302. 2 Bb 177. 8.

Estates upon Condition

An Estate upon condition is one wh depends upon some uncertain event, by wh it may be created, enlarged, or limited - or defeated. Co Litt 201. 2 Bb 152

Estates upon condition are of 2 kinds -

an Estate upon Condition implied, an Estate upon condition expressed - under y last are Estates holden in pledge - 2 Bb 152.

II Estates upon condition implied are those to wh some condition is annexed from y nature and essence of y Estate - implied tho not expressed - as Grant of an office - there y condition implied is, yt y Grantee shall duly execute it and Secus
Litt 8. 3. 78. Co Litt 915. 2 Bb. 152. 3.

itself

is forfeited -

So it is a condition annexed to every Estate, yt y owner shall do nothing incompatible with y state wh he holds. Thus if a Tenant for life or yrs enfeoff a stranger in fee, his estate is forfeited -

2^d an Estate upon condition expressed, is one wh is annexed an express qualification, by wh y estate is to commence, be enlarged, or defeated - Conditions of y^s kind are either precedent, or subsequent -
 Precedent are such as must happen or be performed, before y Estate can vest or be enlarged. Co Litt 201. 2 Pl. 154. Conditions sub. el Pre. int. precedible of implead condition -

Subsequent are those by wh an estate already vested, can be defeated -
 As an Estate is granted to A on a certain rent or condition, yt if it is not paid, y Grantor may enter and avoid y Estate -
 This condition is subsequent. Lit 53. 25. 2 Pl. 154 -

To this head may be referred base fees or fees conditional -
 at Co Litt. 2 Pl. 154. 9.

In y last case if y rent is not pd, y Grantor can't recover y Estate at Co Litt. in he demand y rent on y day, conditions imposing forfeitures not being favoured by y law. Co Litt 201. 7. 1 Pl. 117 -
 1 Co. 28. 5. 25 46 - Cro Eliz 7. 3. 828 -

There is a distinction between a condition express in deed, and a limitation, wh is called a condition in law - "So long as" "while" "until" are words of limitation - "Upon condition" "so yt." "provided," are words of condition in deed - a Limitation cannot truly -
 11. Co 41. Litt 5. 3. 80. 3 Pl. 21. 2 Pl. 155 -

If y qualification annexed is a limitation, on y contingency's happening, y State ceases immediately and of course witht any act done by him who is next in expectancy -

But if an Estate is strictly on condition in deed, y law permits it to endure beyond y contingency, in y Grantor has heirs or assigns take advantage of y breach of y condition by entry or claim -
 Litt 5. 3. 47. 2 Pl. 125 -

If however strict words of condition are annexed, still if on a breach of y condition, y Estate is limited over to a 3^d person Exception

65.
y qualification is called a limitation, for if y qualification were construed as a condition, y Estate wd be avoided only by y Grantee or his representatives. So if it were treated as a condition, y remainder might be defeated by y request, as Grant to A on condition, yt yt he marry, with remainder, on failure to B.

So a devise to y testator's heir at Law on condition, remainder over, 1. Vent 201. Bro Eliz 105- 2 Pl. 155-

If a lease contain a clause yt the lessee may enter for own payment of rent, actual entry is not necessary to entitle y lessee to ejectment. The fictitious entry confessed by y wife in ejectment is sufficient.

2 Doug 409- 1. Vent 202. Bro Eliz 105- 2 Pl. 155- La Ray 750. Latk 954
2 TR. 138. onward An express condition yt y Lessee of a term shall not assign, is good, tho formerly doubted- 8. TR. 60. 61. 37. 2 Pl. 6. 766-
2 alk 219-

If a lease is made to A, his executors &c, with covenant yt his executors shall not assign, it is good, since executors take only for y purpose of satisfying claims vs y Estate-

2 TR. 140. 425-

If one holding an Estate for life, or yrs. on condition, yt he shall not assign, attempts to assign by a deed, wh proves to be absolute void for want of requisites, y Estate is not forfeited, for there is no assignment, and ergo no breach of y condition. 5 TR 64h 64l-

A proviso. yt it shall return to y lessor, if y lessee proves or becomes a bankrupt, is good as y assignees-

2 4 TR 133.

8 do 61-

6. do 684. 2. do 219-

y Condition is void ab initio void, and can't effect y vested State-

So a proviso yt it shall not be taken in execution vs y Lessee, is good-- quia y Lessor has a right to determine who shall hold his Estate-

If an express condition subsequent annexed to y Estate, is impossible at its creation, y Estate is absolute in y tenant - for y Estate is vested, and yt wh is merely void, can have no legal effect- It can't of course divest y Estate as Grant to be void, ni lessee marry a dec'd person-

So if it become impossible by act of God, or lessor, y Estate becomes absolute- As condition yt y Grantee marry within a yr. a person who dies within yt time, or where y feoffor himself marries - as to y first case tis actus dei, y Maxim

actus dei nemini facit injuriam - as to y second, y Grantor
can't take advantage of an impossibility created by himself -

So if y condition ^{subsequent} be no law or repugnant to y nature of
of y Estate, y condition is void & y estate absolute, as a
condition yt y Grantee shall kill S L or y Grantee in
fee simple shall not alien - The conditions in all these cases are
absolutely void - 2 Bb. 157.

But if a condition precedent be unlawful or impossible, y condition
being void - y Estate is also void - for it depends on y condition
and therefore y no title can rest till it is performed -

Co Litt 206. 2 Bb 157.

But an impossible act can't be performed and an unlawful
act tho' performed can confer no right -

The performance of a condition is not matter in pais and ergo
provable by parol Evid - Pais is o. Pow 54-56.

Bardiston 90.

Under y head of Estates defeasible upon condition subsequent, fall
Estates in pledge - 2 Bb. 157.

They are of 2 kinds -

I Vivum Vadium i.e. a living pledge. i.e. Pledges of
an Estate granted to a creditor to hold, till y rents and profits Personal
shall satisfy y debt Co Litt 205. 2 Bb 157. Pow on property -
Pow on M. 3.4. - we called

In y case y grant becomes void and y Estate determines as
soon as y debt is thus satisfied.

Hence it is called living pledge, for y pledge survives y
debt and on discharge of it, reverts to y Grantor y debtor -

Personal
property -
we called
pawns - i.e. o.
of Real property.
Proberity.

II. Mortuum Vadium - dead pledge or mortgage -
This is called dead pledge by reason of y forfeiture of y
Estate. pledged in case of non payment of y debt at y day -
for as we shall see in y progress of y title on default of
payment y Estate mortgaged is forever gone -

Mortgages

A mortgage is defined to be an estate granted by a debtor to his creditor, with condition, yt if y grantor pay y debt on on a certain day. he may reenter, or y Grantee shall reconvey, or yt y grant shall become void. Litt 332. Co Litt 280

Pow M. 4. 2 Bl. 157-8-

This definition don't include all cases, for such a grant made by way of indemnity to y grantee, where there is no existing debt between y parties, is a mortgage as to a surety or indorser

A Reconveyance is not necessary to re-vest y mortgagor's right but is more safe - Secus his right wd vest in porrol Eve - Hence Chy will decree a reconveyance.

'Tis called dead pledge, quia if y Mortgagor fail to pay at y day, his State is forever gone - at Law without possibility of recovery - He may have relief in Equity -

2 Bl 158. Pow m. 4. 12. 168. Cro Ch. 447-49-50.

A Mortgage then is an Estate pledged by y debtor to y creditor as security for y debt - Mortgage in its original sense denotes Mortgage, means y Estate pledged - 'Tis sometimes used as synonymous with Mortgage y estate, or y deed - The grantor is called y mortgagor y Grantee y Mortgage deed. y proper y condition is called y defeasance, quia its offices is to defeat State meaning y Estate & may be incorporated with or annexed to y Grant - is y Estate - or made a distinct instrument for 2 instruments made at y same time and relating to y same subject matter form but one contract - This rule supposes one of y instruments to refer to y other -

If there is no deed Pow m. 5-

to reconvey, twill But if y Grantee gives a bond or covent to reconvey - y land amount to a to y Grantor on payment of a given sum, y bond not referring Sale - to y deed, don't make a Mortgage -

As soon as y Estate is created, y Mortgagor may take possession - It has been held - that y Mortgagor shall not enter till y condition is defeasible - 2 Bl 158. Pow 14-16. 79-80-

Broken - sed nunces But y usual practice is for y mortgagor to remain in Secus - & G. possession till payment or y day of payment

There is a distinction at C. L. ^{between a Mortgage} to secure a gift or gratuity and one made to secure an antecedent debt. In y latter case y money at y day discharges y mortgagee's lien only and reverts y Mortgagor's title, but it don't discharge y debt. It discharges y lien however, if y mortgagor retains y money in his hands. In y former case it discharges not only y lien but also y personal duty - y whole obligation, for as tender discharges y Estate, y Mortgagee can have no claim except on y ground of a personal duty. but here is none -

The condition of a Mortgage deed was formerly considered as a condition precedent, quia its effect is to reinstate y mortgagor in his inheritance - Now Decus -

Thus if a Mortgage in fee was forfeited, y estate being absolute ~~at~~ Law, y wife of y mortgagor was entitled to Dower in y Estate - and it was subject to all his real charges -

To remedy y^s inconvenience, it became usual to grant a long term by way of mortgage - This practice is gen pursued in Eng. now -

In Comt tis usual to mortgage in fee and y wife of y mortgagor has no dower on after foreclosure -

If ^{land} ~~land~~ be given to y mortgagee conditioned for y performance of y ^{bond} ~~agreed~~ ^{mtge} in y mortgage deed non payment at y day is a breach of y condition of y mortgage - he is not left to his election to pay y penalty of y bond and thus discharge y mortgage.

at C. L. if y condition was not strictly performed, y land vested absolutely in y Mortgagee, so y^t an Estate of Great Value might be lost for a trifling consideration -

In consequence of y^s hardship upon y mortgagor, there was a contest between y Cts of C. L. et Equity - The former construed y condition strictly - y latter considered y transaction as a mere collateral transaction contract - hence y Mortgagor in Equity was held y real owner of y land, failure of payment notwithstanding -

The M^s of the finally secured, since the jurisdiction of Mortgages has been exercised almost exclusively in Equity - when the debt is deemed of principal and the mortgaged land merely as an incident. So that whenever the debt is paid, the interest of the Mortgagee determines the equity begins, and he becomes as to his real Estate a trustee to the mortgagor - from time of forfeiture and not ante.

Equitable right after forfeiture is called the Equity of redemption - and is known only to the law of Eng. Pow. 156. 299. 9 mod. 196. But till redemption or satisfaction, the mortgagor's interest continues over in Equity, so far as to entitle him to the possession and take of profits. Ibid. Pow 15.

It follows from the view of the subject, that a mortgage is not such an alienation, as alters any previous disposition, except so far as such a disposition is necessarily affected by it.

As A makes a voluntary ^{with consent} conveyance by way of family settlement, and afterwards mortgages the Estate and the mortgage is forfeited, still issue is entitled to the Estate in Equity on paying the debts. 1 Vern 182-342-329. 2 P Wms 642-2 Ld Ray 968.

So if a devise is made to A of land afterwards mortgaged to B, the mortgage is a revocation in Equity "pro tanto" only, tho' total at Law. Therefore a devisee may in Equity redeem - Pow. 599-618-1. att 606. 798- Pow. 15, 17- 3 att 798-

But a mortgage to the devisee of land devised, has been held a total revocation even in Equity - the interest, being inconsistent for under the devise he must hold as mortgagor and under the deed as mortgagee. And even a mortgage in fee is no revocation in such case. See 11. This has been denied - Prec. Chy 514. Cro P. 449.

Pow. M. 17-18. 3 Vesey Jn. 417 600-5 do 656-

"contract" etc
not condition
not

Every "contract" for a loan of money or for the payment of a debt secured by a conveyance of real Estate and not intended as a disposition of the Estate, is in Equity deemed a mortgage -

And all "private" agreements made at the time to prevent a redemption, in the money is paid according to the contract, are void - Its original nature can't be thus altered - It is enforced

y mortgagee ^{might} take advantage of y Mortgagor's necessities - Once a Mortgage
Once a Mortgage always a Mortgage - always a Mortgage

1 Vern 33. 190.2 - 2 Ventris 364. Pow. 19-21-25-38-9-

IE. if y conveyance

Thus an agreement in a mortgage deed yt if y mortgagor does, be originally a mortgage
not redeem within a certain time - he shall not claim his equity no collateral agreement
of redemption, or yt y conveyance shall be deemed a sale, is ^{can make it}
void - an alienation -

Nor will an agreement in a mortgage deed, yt if y
Mortgagor does not redeem - with a certain time & 3c -

Nor will an agreement at y time to make y conveyance
absolute on failure of payment, if y mortgagee will advance an
additional sum, after y case - ^{And put y mortgagor into y power of me -}

1 Vern 138-488- 2 Vern 520- Pow. M. 23- to 26

But an agreement yt in y case of y sale of y equity of redemption
y Mortgagee shall have y right of preemption wd be good -

2 Equity 599. Pow 26.7-

4- So a subsequent agreement for an absolute sale executed by y
parties -

So of a subsequent release of y Eqty of redemption, with an agreement
by y mortgagee to reconvey on certain conditions - Now y
Mortgagee is not bound to reconvey in y mortgagor strictly
performed y condition. 1 Vern 268. Tabbot 61- 2 Equity 596-5- Pow. 144-

In some cases of family settlements, where y transaction is between
members of y same family & where a benefit or kindness is intended 113.
in a certain event by y mortgagee, an exception is admitted
to y maxim - Once a Mortgage GEG as A makes a mortgage
to his niece for a valuable consideration by way of family provision
redeemible during his life only - It is not redeemible after his
death -

So A mortgages to his brother to secure a lease with
an agreement, yt if he has no issue, y mortgagee shall have
y land, y agreement is binding - Here is no danger of opposition
on y Mortgagor, for a benefit is intended to y Mortgagee -
Pow. 31. 33.

2 Ven. 364- 1 Vern 7- 214- 232- 193- 2 Equity 525- Parol -

An absolute deed can't be qualified by proof of a personal
condition - But an absolute deed it is said, may be considered -

as a Mortgage, when an agreement to redeem is inferable from circumstantial facts which are notorious - and in which there is no danger of perjury - See Quere - There is no such judicial decision - 2 M. 71 - Pow. M. 65 - Tulkot 6d. Dec. Ry. 526. 3 M. 429.

Parol Evi is allowable to prove payment of y debt due to y Mortgagee - Of course y mortgagor^{ce} interest in y bond may be defeated by parol Evi, for where y debt is discharged, his interest is defeated - y St of frauds tamen -

And if he has forgiven y debt, parol Evi of his declaration - Facts is admitted to prove y fact - As take back your writing I freely forgive your debt, for y fact to be proved is not a contract or agreement for conveyance of an interest in land and is not within y St of frauds -

Edm. 90 - Pow. M. 53-56.

If Land is devised to trustees to make money out of y rents and profits for y payment of debts or portions, and there is no clause empowering you to mortgage, still if satis money can't be thus raised, y trustees may mortgage and even sell -

Secus if satis can be raised or if debts &c are ordered to be paid out of y rents only -

As soon as y State is created y mortgagee may enter, y legal title is in him tho' defeasible on payment of y debt -

Secus if there is an agreement, yt y mortgagor shall remain in possession for such a time - He is then tenant for yrs. But an agreement yt he shall continue in possession for a given period leaves quasi tenant at will -

A Mortgagor left in possession with any express agreement is so far as regards y right of possession, and even before y day of payment considered at Law a quasi tenant at will - tho' in some respects he differs from such tenant - Indeed as to y right of possession - he is viewed in y same light in Equity - In y respect he must be regarded alike by both Cts - Cro J. 660 - Pow 667 - Cro J. 657

and
and y is a tenant
at will who has not
been converted into
a tenant for yrs.
or

Aug 21. 2270

Hence he may be sued in Equity with^t Notice to quit
1 E. y 6 mts notice required in Tenancies from yr to yr—

606.
Aug 22-1 atk 60
Ch Cro J. 660. 3
Ch. 303-305-

Common tenants at will being treated as Tenants from yr
to yr. he must have 6. mts notice So in N^o 4- 2 John. 75- 4 do 186-
4 ibid 186- Ruled in Court Contra- 2 Court R. 416-15- 445-

This decision is a manifest violation of Principle—

Mortgagor tho
tenant at will—
must have
reasonable notice

But a Mortgagor in possession is not liable for rent as other
tenants at will are, for he pays interest— but he is not
entitled to y emblements— if y mortgagee turns him out, for all y
Rents and profits are liable for y debt and they are applied
to discharge it— Aug 22- Pow M- 67. 8-70—

Again a Common Tenant at will can't lease or underlet
Such an act ipso facto determines y Estate— But a Mortgagor
in possession may make a lease wh will be valid, in y mortgagor
elects to defeat it— It don't itself determine y Estate— The
Mortgagee may at his election treat y Lessee, as a wrongdoer—
or not. 1 E. as a Trespasser or disseisor—

Pow. 68-9- Cro Ch 303- to 305- Cro J. 606. Aug 22-

Hence y Lessee is suable in ejectment witht any notice and isn't
entitled to y emblements— for y mortgagee may at his election
consider y lease as void, and y Lessee as trespasser 1 E. he may
treat y Lease as an act determining y Mortgagor's estate at
will as is always y effect of a lease by a common Tenant
at will— 3. East 449- 4 John. 215- 2 do - 84-

Such Mortgagee on y other hand may treat y Lessee as his tenant
and by giving notice may compel y lessee to pay him all y rent
owed 1 E. all due before as well as after notice— but not to pay Pow
what he has once paid to y Mortgagor— Aug 22- Pow. 68-9-
1 Atk. 606-
Aug 266- Pow-
68-80-81-

Cro Ch. 303 to 305. Ch. 2. 186-

The Mortgagor when sued in ejectment by y mortgagee can't allege
a title in a 3^d person to defeat y Mortgagee— y mortgage operates
as Estoppel— 1. T R 760. 7. do 46- 2 Ch 295- Pow M- 469—

So if y Mortgagee's Lessee is sued in ejectment he can't deny y mortgagee's right
to lease
1. T R 760- 12em 258-

Such devise is good as y Mortgagor and all strangers —
for y Mortgagor is estopped to deny y devisee's interest & as
vs strangers a lawful possession is satis, ergo he may sue
strangers in trespass and also redeem of y mortgage —
En Ch. 304. Pow. 75.

But as regards y interest in y subject, y mortgag is deemed
in Equity and to many purposes in Law, y real owner of y land
mortgaged — Long 611. 2 Burr 978.

The mortgagee's right is considered merely as a chattel interest
or security or pledge for y debt. Hence if a free hold is mortgaged
the ~~reality~~ reality remains in y Mortgagor, he may gain a settlement
by his possession of it as a freehold — and his interest descends
to his heir, and will pass in devise under a description of land
or Real Estate — Ibid. Infra authorities —

Pow. 15-76-92-109-113-24-70.

^{Mortor} Mortagor may be a voter on an injunction in favour of y Mee and y when y mortgage is
y slight of he for a term of yrs — only — Long 611. 2 = Burr 978. 2 Id. 304 —
residuary interest — 2 atk 294 — 2 P. Wms 341 — Pow. M. 15-76-92-109-113-24-70.
residuary

The Interest of y Mortgagee in y premises mortgaged —

This interest is to be considered at 4 periods —

First between y execution of such deed and its forfeiture —

Second, after y forfeiture and before he takes possession —

Third — after he takes possession upon y eviction of y Mortor —

Fourth The Foreclosure —

Before forfeiture y mortgagee's State continues as it was
at C. L. before y interference of Chy — The Legal Estate is in
him to y whole interest pledged defeasible as before stated —
He may take immediate possession —

2 Vern 156. Pow. 74-80-228. Prec Chy 423.

Hence any conveyance, Lease &c, by y Mortor during y period
of y same land is said to be void as vs y Mortor — The reason
is yt y mortor has no vested interest, but a ^{contingent} conditional right
to sever it in future — Pow. 80-Dug. 22.

The Meaning is, yt he may defeat y purchaser of y possession

by treating you as wrongdoers - Hence also y Mortee may compel y mortors lessee on notice to pay him on notice to pay him y rent even before forfeiture - Pow.

This holds even if y Lease is prior to y Mortgage, for y mortee has y legal title to y reversion and y Rent is incident to y reversion i.e. y rent due before y notice as well as post, but not yth wh has been paid -

But he can't recover rent due before y mortgage was made - for then he has not reversion - Ibid -

Where a term for yrs is mortgaged by Lessee, y Mortee is in y nature of an Assignee of y term, if y whole term is mortgaged -

But in y case y Mortee was olim held not liable in y Ctg - ni he takes actual possession, for it is a mere security & intended like a com assignmt as a disposition - This Rule holds tho' y mortgage is defeated - forfeited - 2 Vern 275-374 - Doug 438-44 - Pow. 85-8-92 - Lis now holder Contra - Says Gould -

But if y Mortee takes possession, he is by all y opinions liable in all y Courts not running with y Land like other assigns - 3 alk 512 -

for he enjoys y profits - 1 Ves Jm. 235. 3 Bkly 166 - abbot on Shp. 21-21 -

12-12. The mortee has after forfeiture and even tho' he recovers in eqdmt and take possession, only a chattel interest - according to y law - of Equity only a lien in security on y subject -

1. alk 605 - Pow. 92-118-177 -

This interest - will not regularly pass in a devise under y words lands, tenancy et hereditamty -

32 There is this qualification - As y Rule, yf y devisee has no other property answering yt description, his interest in y Mortgage will then pass - for such is evidently his intention - 2 Vern. 621 - 1. Vent 351 - 1. Vern 32 -

1-57-167-11- He is considered in Equity then as having only a chattel interest till after foreclosure, or on his death it goes to his executors - and not to his heirs - 1. Vern 367 -

Hence y assignmt of y debt on y land carries his interest, tho' he don't assign y interest mortgage deed, for y debt is y principal y security is incidental and nothing remains in y Mortee to be secured by y mortgage - 1. P.M. 458. Pow. m. 450 3-4 - Pow 358 - 1. Comd R428. 428.

Hence also he can't before foreclosure, do any act of ownership -
 wh will injure or incumber y mortor's right, as Mortor brings
 a bill to redeem on paymt. - It's an insuff^t defence to answer
 yt y mortee has leased y land and yt y term has not yet
 expired - 1. Equity Cas. 610 - Pow 93.

Secus y mortee might forever prevent a redemption witht
 a foreclosure - The Ld Ch^{cellor} said in y last case, yt y mortgagee
 might lease for yrs. before foreclosure so as to bind y Mortor
 to avoid an apparent loss and from necessity.

2
 Bern 392.592
 3 att 723.
 Pow. 94.
 Pow 94.
 3 atts. 723.

So regularly in equity a Mortor in fee can't before y foreclosure, justify
 y waste - He is liable to an injunction, tho not to an action at
 Law - But if y security is defective, y mortee in fee will
 not be restrained from doing waste before foreclosure - Equity
 interposition being discretionary, but y timber when cut must be
 be applied to y paymt of y debt, and thus go to Mortor's benefit -
 Pow. 95.

And in cases in wh y mortee actually commit waste, as in cutting
 timber so he is accountable to y mortor - for y value of what
 he has taken from y freehold &c. tis to be applied to y discharge
 of y debt - first of y interest - then of y principal -

3 atts 723 - Pow. 95.

But tho y mortee can't incumber or commit waste on y
 Estate ^{before} foreclosure - to y injury of y Mortor, yet he is allowed
 such expences as he incurs in necessary repairs and other acts
 for y preservation of y Estate and may add ym to his principal
 to carry interest - It's beneficial to both - 3 atts 518 - 4 - 16th

1 Mills 34 - 2 Bern 84.

If a mortgage be made of an Estate, to wh y mortor has no title,
 and post y true owner conveys to y true ^{mor} owner & his representation
 y mortee will have y benefit of y last conveyance - 2 Bern 11 -
 Independent of any Rule of Equity - I G thinks - such vid y necessary
 effect at Law - - The mortor will be estopped by his mortgage
 deed from denying yt had title of y land at y time of
 making y deed -

This is grafting
 on
 my old stock -
 1 Pow 97.

This Purchase is expressed to be a graft on y old stock -
 Pow 97- 2 Ves. 11. 1 T R 760 - There will a grant to his representatives
 be so considered. in they are liable for y mortgage debt?
 As Mortors heir having assets by descent - I think not -

If y Mortee for a term of yrs procures a new one (a renewal)
 after y expiration of y old one, this will be a trust for y mortor
 and redeemable, y renewal being considered a ^{continuance} conveyance of y old
 one - 7 Br B C. - 432 Pow. 97-8-

A Mortee in possession is not bound to expend monie in for
 necessary repairs, tho if he has expended any in defence of y mortor's
 title - he may add it to y debt and dray interest - 3 Atk 518 -
 Pow. M. 98 -

The Mortee takes y State subject to y same incidents, to wh it is
 subject in y Mortor's hands - ergo a forfeiture of y Estate by y mortor - or rather
 destroys y mortgage term - As a Tenant for life mortgages in such a forfeiture
 fee - ys is itself a forfeiture - 2 P Mms 146. Pow. 99-100 -
 P. Chy 591-72 - Contra P. Chy 108 - in favour of Reversioner

A Lessee for life or yrs mortgages his Estate to B & then makes remainder
 a deed conveying y Estate in fee to C. ys is a forfeiture of his ^{23c destroys}
 whole interest and y mortee loses his title - It goes with y
 mortor - The mortor can't exempt his Estate from forfeiture
 for alienation by merging it in another -

So if a forfeiture post. (in favour of a remainder man or reversioner)
 by mortor in possession - Thus if a particular Tenant having
 mortgaged remains in possession and comonity waste post. ys
 forfeits y whole Estate even of y Mortor

Not so in case of forfeiture to y crown for treason - for y reason. is. yt
 y king takes only what interest y offender has - Pow. 111 - y right of y state
 is subsequent to y

Of y Equity of Redemption - Who may claim it - ^{me.} right of y mort
 Secus in
 cases above -

The Equitable interest remaining in y Mortgage ^{or} after forfeiture, is called
 y Equity of redemption - This interest is called a Trust, for y whole legal

He holds all
y legal estate.

Estate is in mee, who is considered a trustee of y Estate for y mort
till foreclosure - 2 Atks 526. 126 666. Pow 15. 114. 321. 2 -

There is a
priority as to
y right of
redemption -

He & mort^{or} may at any time redeem by paying y debt and
interest - So may any person having an interest - 1. Vern. 193. 1. Eq. Case 315
under him in y land As A make a voluntary deed to B -
and pott mortgages to C - B may redeem it of C - Pow. 108 -

Pow. 108 - So of - y Mort^{or} tenant - So of y assignees of y mort^{or} - 1. Chy. Cases 71 -

So after y mort^{or} death his heir may redeem it - if y
inheritance is mortgaged and not devised to another - for y
Equity is his by descent - Long 22 - 1. Vern 33 - 190 - Pow 69 - 108 - 4 -

a
a mortgage of a
half a lease for
yrs - may be
redeemed by y
respondents ad litem
adm - or Exec -
2 - vidy 304 -
Pow. 109 -

And an Equity of redemption of redemption is governed by y same rules
of descent as if it were a legal Estate - At C Law. it will descend
of a fee to y oldest son - if within y Custom of y Borough Eng
to y youngest - according to y custom of Gavelkind to all y sons
and by our own to all y children generally - and equally -

2 Vesey 304 - Pow. 109 -

Pow 109 - So y devisee of y land of redemption - may redeem 2 Burr. 978 -
So a judgment creditor of y Mort^{or} may redeem, for y judgment is a
lien on his Estate

But a judgment is not in Court. Hence y last time don't hold here.

3 Atks 200
1. Vern 399 -
2. Atks 440 -
Co Litt 102 - a. b. -

But a mort^{or} creditor having levied an execution on y land may
redeem - and I believe y same at N Eng generally - 3 Atk 420 -

In Court by virtue of Stat^{ute} tis y practice to levy an execution
on y Equity of redemption as on a legal estate and to appraise and sell
it off to y mort^{or} creditor - Secus at C Law -

In Court there have been some decisions of y Supreme Ct. y
execution creditor obtains only a lien or incumbrance. But these
decisions are now overruled and it is settled y mort^{or} and y right
of y mort^{or} is appraised as y creditor as y executor y co interest of y
former is relinquished -

So in Eng y Crown may redeem where y mort^{or} has forfeited his
estate by committing treason or in some cases of felony -

1. Brown P C. 22 -

If a mortgaged Estate descend to an infant, his guardian may

with direction of a Ct of Equity, apply y profits to discharge y debt.

The widow of y mor if she have a jointure in y land may redeem and tho' y jointure is in part of y land only, she may redeem y whole. - This Rule relates to a jointure made after y mortgage - for if before it take precedence of y mortgage -
1. Vern. 191 - before

2. 2. So tho it is settled upon her after marriage - 1. Vern. 33. 193 - 1. Eq. Cas. 219 -

And in y case if she joined her husband in incumbering it, her proportion of y redemption money is $\frac{1}{3}$ and if she pays for y loan more y n one $\frac{1}{3}$ - she and her representatives will hold as y Estate - at $\frac{1}{3}$ -
Mo's heirs - till reimbursed y excess -
y Fee

in incumbering her jointure

If she did not join, she is not bound to bear eventually any part of y debt as between herself and y heirs - but will hold till y whole sum advanced by her is repaid - 1. Vern 191. Pow. 313. 17 -
1. Chy. Case. 171 -

The Husband of y mor may redeem as tenant by y Courtesy - as a feme sole mortgages her Estate in fee and then marries - and after her death, y husband is tenant by y courtesy - of y equity of redemption - 1. altes 603. Pow. 112. 15.

But y mor wife is not in Eng tenant in dower of y equity of redemption of y mortgage in fee. aliter in Court -
Pow 321.

But in order to entitle y husband to courtesy in an Equity of redemption or in any of her best Estate, there must be a seisin of y free hold by husband and wife during coverture &c. an equitable seisin or what is equivalent in Equity to an actual seisin of y legal Estate at Law - Pow. 114. 116. 1. Vern. 298. 307.

States
But in y Ct generally entitle to dower in y equity of redemption.
1. Com. R 553.
1. Com. R. 58.
1. John. 200
7. do 278

Actual possession with receipt of profits is satis - the mor's possession is only yt of a tenant at will at Law -

But y husband is not entitled when there is no equitable seisin - as she devises a free hold of inheritance to trustees to y sole and separate use of a married woman and the trustees keep possession - y husband has no control over it - She as to y is a feme sole -

Hence y husband cant be said to be seized even in Equity -

Suppose in y last case, yt y trust had not been for y separate use of y wife - wd y Seignior of trustees have entitled y husband to Curtesy?

A Subseqt incumbrance may redeem a former -

As a mortgages to B and then to C. C may redeem of B for he has an interest under it in y land. He then assumes y right wh y first M^r had in addition to his own and may hold it all, till he is repaid what he has paid to y first M^r and he can debt beside -

2 Vern 663. Pow 117. onward 124. 2 Chy Cs 170.

So in Eng may a judgmt creditor of y m^r, for his judgmt is a Lien upon y land as vs y m^r -

Secus in Point -

If a m^e judgmt creditor or Lessee of y m^r redeems y mortgage his heir - devisee or assignee may redeem of him. for he has not y whole equitable interest - but y m^r has y whole residuary interest -

If M^r may redeem even after a release of y equity of redemption, if y release appears from y circumstances to have been made upon a secret trust for his benefit - As where it appears, yt y debt due was very small compared with y value of y Estate.

If there are tenants for life with remainders or remainder in fee of an equity of redemption, they are to pay proportionally on redeeming. E. Tenant for life $\frac{1}{3}$ and he is obliged to pay y whole, his representatives may hold over, till those in remainder or reversion contribute their proportion - One Chy 62. 1. Chy Re 221. Pow. 120.

As a devise of y Equity is a for life remainder &c - said in Chy, yt Tenant for life shall have $\frac{2}{3}$ of y debt But according to other opinions - Note y^s distinction - If after redemption by tenant for life, y remainder man applies to him to redeem, during his life - y Tenant for life bears $\frac{1}{3}$ - Secus if y application be to redeem after y tenants death - Here y representatives allow towards y debt only so much as y enjoyment of y Estate was worth, tho it was over but l.

Pre. Chy

44 -

This qualification of *Quia* appears equitable, and if *y* mortgage money was payable on a contingency not has not arrived, he in remainder may exhibit a bill ~~quasi~~ ^{tenant} as a tenant for life and compel him to keep down *y* interest of *y* mortgage debt during his possession - Secus *y* tenant for ^{life} might avoid any contribution, and yet hold possession, for while *y* contingency is future, *y* remainder man can't redeem i.e. he can't enforce it - Pow. 121. 442-444.

If a tenant for life pay *y* whole debt in redemption and makes improvement and dies, *y* remainder man &c. on receiving of his representative must pay $\frac{1}{2}$ of *y* lasting improvements 2 Equity Cases # 596 - Pow. 21-444

But no interest is allowed for *y* money he paid: for he is bound to keep down *y* interest accruing during his Estate as he wd if he were in possession and *y* debt not paid -

And *y* remainder man in Equity may compel him to keep down *y* interest

An Equity of redemption on a mortgage in fee (or any other Estate) is not assets at Law - for *y* Estate of *y* mort is gone - at Law - Therefore to an action at Law by a bond creditor vs *y* mort's heir, 2 Atk 294 - he may plead ^{nothing by descend.} *res per descensum*. But in Equity tis assets, and Pow. 132 - Chy will, if necessary, order a sale of it for *y* purpose of paying debts -

Note if *y* Estate is for life or for yrs *y* reversion is assets at Law - and if *y* heir release or alien it, he is liable in Chy for *y* money recd, or *y* value to *y* executor or creditor to *y* amount of *y* debts, but these Rules suppose a deficiency of personal assets -

2 Vern 61 - 1-20 411 - 2 Atk 294 - 3 P & M 341 -

Being Equitable assets only, ^{in Equity} all *y* creditors are paid out of it 2 Blk 511 - "pro rata and pari passu" with regard to *y* rank or quality of *y* debts, - In Equity there is no such priority, as at C Law -

In Court all *y* Equities of redemption are like other real assets - They are assets at Law - If *y* Mort is dead, they may be sold like other property to pay *y* debts -

And in Eng *y* mort's reversion expectant on *y* determination of *y*

mortgage for yrs, is legal Asset, and y creditor may have y judgment vs y heir with a cessat Execution - till y reversion comes into possession - As a Tenant in fee mortgages for 10 yrs. or a tenant for 100 yrs mortgages for 50 - In y last case however y assets are Personal, and in y executor's hands - The action must lie vs him and not vs y heir -

But if y judgment is in these cases of assets granted creditors of course can't by bill compel y heir to sell y reversion. They must wait 'till it fails -

An equity of redemption is devisable for y payment of debt -

And y assets in y case are to be paid *pari passu*, y Estate devised being but an equity and so equitable assets - 2 P Wm 412. 2 Atk 50. Pow 126. 9 -

1 Vern 63. 9 -
101 - Pow 126 -
128 -

Formerly this distinction was taken - If land mortgaged was devised to one in fee for y payment of debts generally, y assets were equitable - but if y devise was made to y executor, y assets were legal, he being supposed, to take as executor -

1 Co Litt 112. 113. n
181 -

Now settled since y executor is but a naked trustee in y case, and y equity of redemption thus devised to him, is equitable assets - only.

It is at holden by Wright & Cooper, yt if lands are devised for y payment of a simple ^{contract} debt and legacies - y debt shd have no preference, quia y will of y testator alone makes th y land liable - and y devise expresses no preference - 2. Equity Case 371 - 1 Mod 117 -

See Quere et see cases Contra - 1 Chy Cas - 275. 2 Atk 248

1. Vern 101 - Pow -
180 - 1 -

Tho regularly debts have no priority, when y fund is an equitable one only, yet a second mortgage shall have his debt out of y equity of redemption, in preference to other creditors - tho' his interest y legal State being y first mortgage - for his right is a special lien, wh Equity will not take away -

There is no instance in equity, in wh an equity of redemption has been holden to be liable on execution of bond creditor in y life time of mortgagee, and after his death, it is equitable assets and goes to pay all

all y creditors, pari passu. 2 M 292. Pow. 132-

There may be a possession of an fraction of an Equity of redemption. 1 M 604-6-
" possessio fratris " 8 JR 213- 1 Co 124 Pow 132
132.

In general no person is allowed in Equity to redeem, ni he is entitled to y legal Estate, as it calls it - i.e. ni he has a vested title to y Equity of redemption - or a vested interest in it - entitling him to call for y Estate on paying y debt. Pow. 134- 2 Equity C- 605- 1 Vern 182- paying

As a claiming under a deed by y Mor^{or} heir brings a bill to redeem the Mor^{or} shows a deed of entail entitling another person as special heir - ^{EE} it is not permitted to redeem at his peril - He must show y entail is docted -

But if he in whom y title to y equity of redemption is, refused to redeem, another or any other interested i.e. having a claim upon y Mor^{or} asselt - may do it - as Mor being a bankrupt, a majority Bond. 30. Pow 131 of y creditors prevented y assignees from redeeming - y other creditors Pow. 133. 4. - 4- were allowed to redeem - tho' they had no title to y equity of redemption - as it was a means and under y circumstances - y only means of obtaining paymt -

So in common cases if y Mor^{or} heir will redeem, y general creditors cannot. Secus if y heir will not. Ibid -

The right of redemption being a creature of Equity, yt it will always make it submit to its own rules - i.e. to y ends of justice - and, 2 Vent 350-
" he who seeks equity, must always do it " - and Chy will decree Cow. 601- Pow. 135.
a redemption in favour of y Mor^{or} - or those claiming under him - 135
either absolutely or ~~under~~ circumstances on certain conditions, as y justice of y case may require - As a Man ^{ce} applies to redeem on paymt of y debt, if he can't set aside y mortgage ^{on that} at Law - Chy will not indulge him in y ~~post~~ ^{alternative} If he wd have Equity - he must do it -
He must either proceed to redeem or abandon his bill, before he attempt an avoidance of y mortgage at Law - 2 Vern 536 -

So also if y Mor^{or} having previously attempted to avoid y mortgage at Law. post attempts to redeem - y Mor^{or} is allowed vs him all his costs and expenses in y trial at Law - 2 Vern 536- Pow. 137- 473-

These Rules vs y^r heir holding by consent - 2 Vern 207. 1. & 24.

2 Equity Cases 325. Pow. 129. 140.

Tho' if y^e M^r can't compel y^e M^r to redeem before y^e days of paymt yet in case of a hard bargain on y^e M^r he will be permitted in Equity to redeem before y^t time - As where by y^e increase of value of y^e land, y^e rents and profits will satisfy y^e debt, long before y^e day of paymt - 1. Vern. 232. 183. 394 - Pow. 137. 139.

foregoing cases, show
y^e M^r of process
in Equity.

Pow. 139.

He who seeks equity
must do so.

If possession be obtained vs y^e M^r by fraud pending a suit, it may be restored before there can be any decree of redemption -

Must - 2 Eq Cases. 599.

A Mortgage of B here to secure one loan, and post White A - to secure another, one of wh^{ch} securities is insuff^t - y^e other more yn satis - he is not allowed in Equity to redeem y^e one witht y^e other - This supposes y^e loan to be from y^e same person - 2 Vern. 286. 1. & 29.

Pow. 139.

245. So if his heir applies to redeem - 1. Eq Cs 325.

The interposition of a Ct in a case merely equitable, is said to be discretionary, ergo y^e Ct may say, we will not decree in favour of y^e Plt, ne he will do y^e or y^t - They may not make a new contract for y^e parties, but they may withhold their interposition - ne y^e Plt will comply with their terms, as in y^e last case - if y^e M^r has brot his bill, praying y^t y^e M^r sh^d redeem - both pieces, y^e Ct wd not grant such a decree - for y^e wd be to make a new contract between y^e parties - In short y^e discretion of y^e Ct of Equity consists in withholding and not in extending its interposition.

So if one make 2 mortgages to one person and dies, and his heirs claiming by descent, endeavour to defeat one - and post apply to redeem - they shall redeem, both or neither -

He must do equity - Even if he claims by purchase under one title, he is then as to y^t a stranger to y^e father's title - as Tenant in fee of B A - and tenant for life - remainder to his eldest son in tail - of White A - mortgages, both his heir may

may redeem y former and avoid y latter -

A purchaser of y M^{or} shall hold y land as y M^{or} - and his heirs - for y whole sum, tho' he gave less -

But as no subsequent incumbrancers or creditors, he shall hold (if he gave less y n y 'debt) for what he gave only: - for y creditor has as high an equity as to y amount or value not paid for - as a purchaser at taking y gain of y latter to supply y loss of y former - is dealing equal justice to both, neither loses by y other -

So if there are serial incumbrancers and y heir of y M^{or} purchases y first mortgage, y first incumbrance shall not stand in y way of y subsequent incumbrances for any more y n y heir gave -

The reason is y same as in y last case -

May not y heir then redeem of y subsequent incumbrances for y same piece together with his debt &c?

It is a general Rule, yt if y heir - trustee - executor - or agent - of y M^{or}, purchases in his M^{or}'s debt as in y last case - at a discount, - y M^{or}'s creditor and even his legatee, shall have y advantage of y discount - The heir and &c are subject to y same Equity - as y M^{or} whom they represent -

But if a stranger, or even an M^{or}'s heir, or trustee, purchases ^{originally} to protect others, wh he himself holds, he shall be allowed y whole money due, tho' he bought it for less. The Equity being equal to y legal title, prevail - He is but a mere voluntary purchaser for his own security -

If M^{or} is indebted to y M^{or}, secus y n upon a mortgage, he will not be permitted to redeem - it upon a bill for ~~debt~~ redemption, ni he pays both debts - He must do Equity - &c

1 Vern 41. 344 - Salk 84 - 2 Equ Cas - 603 - Pow. 143. 342 -

Equ Cas 603 Secus, it wd seem on y M^{or} bill to foreclose - Pow. 511. 15 -

In Note y Rule has lately been denied, ni where y M^{or}'s heir applies to redeem -

3 B Ch 162 162.

2. D 376 -

If a man's heir wd redeem, he must pay all debts due from
y man to y M^{or} by bond, as well as yt secured by mortgage, -
for y heir after redemption will be in by descent, and y Equity
w assets for paying bond debts. Circuity must be avoided, - beside
he must do equity, as his ancestor must have done -

1 Dem. 245. 1 P. M. 775. 1. besty 87. 3. att 680. Pow. 143-4-

quia y Ct can't
impose terms
upon y def -

Secus, I suppose on a bill to foreclose, for on such a bill
paymt of y bond debt wd not be required, secus tyn by a
compulsory decree - for y paymt of it, ^{wh} wd be making a new
contract for y parties, by y sentence wh enforces it -

But on a bill to redeem, y Ct may refuse to interpose
at all, ni on condition of y bond debt being paid -
This condition is not making a contract for y parties,

2. beam. 177.
3. Palk 246.
Pre. Chy 512.
Pow. 144-5-

So if a Lease for yrs is mortgaged, and then a new debt
contracted by y M^{or} on bond y executor if he wd redeem
must pay both - for y ^{creditor} ~~condition~~ is changed with simple
contract debts as well as those ^{by heir} ~~are~~ by speciality -

2. att 52 -
3. Palk 240 -
1. besty 87 -
3. atts 556 -
3. Palk 34 -
Pow. 145-48 -

But if there are several incumbrances, and y first ^{claim} a bond
debt also, it will postponed to all y subsequent incumbrances,
either by mortgage, judgment - for a bond is no lien - tis a
personal duty - or charge only - A bond creditor has not y same
Equity as an incumbrancer, as vs y heir -

The incumbrancer has higher equity to claim y property covered
by y incumbrance yn any general creditor can have -

And since If of fraudulent devises, y devisee of an equity of
a redemption, can't redeem wthout paying y bond, ut supra

He is a mere volunteer and stands in y same relation to y bond
creditor as y heir wd -

If y assignee of y M^{or} has a bond debt - he has y same Equity,
as y M^{or} or his heirs, on a bill to redeem, as y M^{or} wd -
have - Pow. 145-5. 2. Chy 50. 4th

If y money due on y ^{bond} were first and then a mortgage made - y M^{or} wd have y same Equity as above, as to y debt -

Where y M^{or} or his representative is Plot in Equity on a bill to redeem - y Ct will carry y debt beyond y penalty, if y principal ^{of y bond} and interest exceed it.

He must do Equity or Chy will not interfere - y Ct indeed will not alter y contract - but will refuse its ^{execution} interpretation interposition upon any other terms - 2 Eq. 611. 2 Atk 518. Bro 146. 7. Salk 154

3. H. 432. 35-

Secus it seems of M^{or} if y Plot on a bill to foreclose - Pow. 146. 7. 3 Bla 432 - Salk 154 - The reason of y distinction is same as yt before -

If a M^{or}, or his assigns, to whom any money is due on bond, countenance any fraud upon a 3^d person by concealing it, y mortgage may be redeemed on y payment of y mortgage money only -

As M^{or}'s son being about to marry his intended wife's father with a view of making arrangements for a settlement, applies to y M^{or} to know what is due on y bond - y latter denies yt there is any bond & settlement agreed on -

If part of y mortgage money is paid, and then a further sum borrowed - y M^{or} on redemption must pay y last as well as y first - 1 Vern 41. Pow 147. 8. 342 -

But y purchaser of y Equity for a valuable consideration, may redeem wthout paying y bond, in such cases, for having a direct interest in y ^{mortgage} ~~bond~~ like an incumbrancer, his claim is higher, & one growing out of a personal charge -

mortgage

A M^{or}'s claim is ~~good only~~ as to y bond, is good only as ^{vs} y M^{or} and his ^{assigned} assets - 1107. 1. Ves. 87-662. 1. Eq Cas. 325-

A M^{or} may be defeated of redemption by lapse of time after forfeiture, y M^{or} being in possession - But a ^{right} of possession after forfeiture is not of itself and absolutely a bar to M^{or}'s right of possession, not being within y Pt of Lim - 1 E. as between M^{or} & M^{or}, for y possessors of y M^{or} is not adverse -

initate

But still y Ct of Ch will so far y St as to consider 20 yrs -
possession by y Mee after forfeiture as prima facie a bar to y Mor
right, as a presumption, yt y Mor has abandoned his right of redemption
1. Eq Cas. 352. 3 P M 287 - 3 Atk 330. Pow 148-150.

The difficulty of making up an account for so long time, is an additional
reason -

This presumption may be rebutted by such circumstances as
account for delay of redemption, and these same in gen general
w^h prevent y St from running in y case of legal States - 18, y same
as bring a case within a saving clause of y St. As Infancy -
Coverture - Insanity - Imprisonment - being beyond seas &c, at y
time of y rights accruing -

So also by facts showing y relation of y Mor, and recognized
by Mee, within y above period, as by paying interest -

Or by making up y account between y Mor and Mee -

Hence y difficulty of taking y account is also removed -

2 Atk 333 - 2 Vent 340 - 2 Vern 418. Pow 149-50. 53-4. 61 -

So y time allowed for redemption after disability removed, is said
to be y same, as y^r prescribed in y St, for making entry after y
removal of y disability in y saving clause ^{he is allowed} for 10 yrs in England -

3 P M 287. on Pow 149.

But if fraud has been practiced upon y Mee to prevent his
redemption within y time allowed, no length of time however great
will operate as a bar to his redemption, - as if an absolute
mortgage deed is executed and falsely read to y Mor when tis made,
with condition y^t y redemption shall be with Mor's own money

Talb 63. Pow 151 -

But if y 20 yrs have begun to run, y intermission, of any
of y legal State disabilities ^{mention} ~~in~~ y person having y right
of redemption, won't save y right of redemption - As forfeiture
accrues to y Mee and takes possession, while y owner of y
Equity is under ^{no} disability - Post y Equity descends to an infant -

2 Atk 333. - Pow 152 -

Secus if y disability existed when y Mee took possession -

But when it is agreed *vt* *y* Mee shall take possession - and hold till he is satisfied - length of time is no bar. The Mee possession is not *Evi* of *y* Mors abandonment - 60 yrs possession was holden no bar ^{even} at *E* Law - There is no occasion for *y* aid of Equity - The Mor or his heirs may redeem even at Law - in any yr - 1. Vern. 418. Pow. 156. satisfied by *y* profit -

Any act of *y* Mee by wh he has recognised *y* mors right of redemption within 20 yrs, will prevent *y* presumption i.e. bar - as devising *y* money in case *y* Mortgage shd be redeemed, having exhibited a bill to foreclose within *y* period -

So *y* Mee having within *y* time agreed to purchase *y* *E* of redemption. 2 Equity Cas. 596. 1. B. P. 309. 5 do 174. Pow. 158. Time is no bar, if *y* Mee submits to be redeemed -

The Mor if in possession is never barred by lapse of time - Pow. 162. 61. St 4. to 5. Mill et Mary deprives *y* Mor of his equity of redemption on certain conditions, when he is guilty of fraud - in concealing prior incumbrance and gives an absolute Estate to *y* Mee -

A Second Mortgage of *y* same land is considered as a mortgage of *y* land itself - not of *y* equity of redemption - If it it were *y* Mor @ not redeem *y* first till he had redeemed *y* second

Of a devise of lands mortgaged -

The interest of *y* Mee like *yr* of *y* Mor, is devisable, and a devisee may have a decree of foreclosure -

Co. Ek. 447. 450 - 2 Burr 978. Pow. 167. 170 -

Thin it was holden *vt* *y* whole of *y* Mee interest in a mortgage in fee is forfeited and not pass in a devise under *y* words 'all my mortgages' but *y* devisee ~~not~~ have at most but an Estate for life - for *y* Mor interest was then deemed a fee simple -

and *y* words are not such as to carry a fee - indeed was questioned an they wd carry an Estate for life - Authorities Supra

But now unanimately ^{all} ~~most~~ interest - being deemed a chattel only, & whole of it ~~no~~ pass under such words, as ~~no~~ in a devise carry only an Estate for life -

E Contra! it will ^{not} pass in a devise under y words, "lands tenements, hereditaments" - if y testator had other property to wh^y words might with propriety refer - y words not being proper to distinguish a chattel -

2 Equity Cas
106. Bardon
457-

But if y Mee had ^{no} other property answering y description in point of situation and other circumstance, a mortgage may pass under these words - as "all my land &c in A" - when he had no other interest in land there - A's intention governs and here his intention to pass his interest is manifest -

2 Vern 521. 120.3 - 2 Vent. 357-

1. Equity Cases
318 - Pow
175-95.

If y mort^{ee} devise his interest, y devisee may have a decree of foreclosure vs y mort or his heirs - y Mee heir need not be made a party - for he has no interest - It is devised away -

A devise by y Mee of money due on y mortgage, don't, it is said carry y interest due at y testator's death -
As 1000 secured to me by mortgage - The intention seems to be to convey a sum certain and not uncertain -

Suppose a devise was of all y money due to Mee &c on such a debt secured &c w^d not y interest pass in such a case &c

Cartney 79-81-
35-3 mod
Pow 1262.
178-9-

It has been extrajudicially contended an a Mee interest will pass under a devise, not attested according to y St of fraud in Eng - or Comnt St devises - 2 Burr 978-

It seems y^t it will tho' it has never been expressly decided - being a mere chattel - Lands and Tenements are y words in y Eng St - Real Estate in y Comnt St

of Priority of Incumbrances & of Tacking-

Prior and Subsequent incumbencies

If there are several mortgages or incumbrances on y same Estate
priority takes place according to y dates of y respective deeds-

1. B. P. C.

The first is preferred to y second, and second to y third, and so on. 2 Vern 81-1. D.P. 66
and in y^s respect Mortgages stand on y same footing in Eng, as Judgmt
and its recognisance. Its Stople, &c. 2 Ves 477. 2 Vern 524. 1. Eq. Cases, 142-

68- and in y^s respect Mortgages stand on y^e same footing in Eng, as Judgments
and Its of recognisance— Its Staple, Sc. 2 Ves. 472 2 Vern 524. 1 Eq. Case, 142-

Qui solior in tempore, est potior in Pare - Po. 234 -

But this priority under some circumstances may be forfeited, and a prior incumbrance postponed to a subsequent one, - this happens

1st when a person one has been guilty of fraud, or neglect, affecting
y interest of a subsequent incumbrancer 3 P.N. 280. 2 Atty 49 - Pow 183.8.

Libsey 360 - 1.7.8.755-

10th 5th 2^o When a subsequent incumbrancer purchases a legal Estate to protect his own vs an intermediate incumbrancer - 2 Atk 49 Pow. 83. 186-

1 Bern. 187. 8- 2 besy. $5\frac{7}{8}$ lbs. 240- Pow. 1945-

(3 P^{ms} 280. 1. ves. 360. 1 LE 755=

This latter operation is called tacking - Root 60.

II. If y first-M^{an} by fraud or artifice conceal y mortgage, to induce another to lend money on y same security, y latter gains y priority-

as M^{ee} is present when y^e M^r agrees to give a second mortgage -
of y^e same subject to F. L. and makes no mention of his own -

Pre Chy 25-

2 att 49. Roberts franc Conveys. 528. 7. Tow, 183 invens. 1 bern 3/
H. 180. C. 132. 5-

So if y first M^{ee} was a witness to y second mortgage deed,
and knowing its contents, does not inform of his own -
y second will gain a priority - 1. B Mm 393 - 1. Pow. 186. f

second will gain a priority- 1. B. M^m 393- 1. Pow. 186.

And it has been said, yt a witness shall be presumed to
know its contents - and y first three in y^e case shall los

Contents:
18. know y content.
of y lead -

his priority in he proved y contrary - I do Haranwick & C
Shurlow. Contra - and I think very correctly -

1. PR 763.

f. Bern 138.

So if y Mee is guilty of any neglect, in consequence of wh another; Pth 2^d is encouraged to advance money on y same security, y first is ^{1st 2^d 3^d 4th} postponed, - as y first Mee leaves y mortgage deed in Mor's hands, and y Mor. shows y deeds - to prove y land incumbered - 2 Vent 337. Pow. 187

Mar 8 P No 250-
15 E. 75- 762.3.
1. Dec. 300. 1. Dec. 130-

who makes a second ~~mon~~ mortgage and delivers it to y second mortgagee - When one of two innocent persons must suffer through negligence of one of ym - he, by whose neglect y loss happens - must bear it -

1 Vesey. 360. 14-15-136

of a man's title
to real property

Pledging

Note y^s Rule wd not hold in such case, B^y thinks in Court - for y town registers and not y title deeds are y highest Evid^{ence} of y M^{an's} title, to 3^d persons - In N^Y - there are county registers, and done there -

Pledging "Title deeds in Eng, creates a lien on land, and it is enforced in Chy by compelling a Sale - 2 Br. Chy 269. 2 East 456 -

If one who is about to lend money on a mortgage security, applies to a former M^{an}, to know if he has a mortgage on y land, and y latter denies y fact, he loses his priority, provided, y second M^{an} at y time of applying for information, informs him yt he is about to lend money to y mortgagor - But not if a
an enquiry is merely an act of curiosity -

III. Tho' where several interests affect y same Estate, they have priority according to y period at wh they commenced^d, yet y^s Rule admits of exceptions, where one of y subsequent claimants obtains y legal Estate, for he may make of it all y advantage yt y law admits, of course he may protect his equity, "for when y equity of 2 persons is equal, y law must prevail" - y^s is y great principle - This is y General principle of y doctrine of tacking -

Pow. 190 - 4 do -

As 3^d m^{an}, y last, having advanced a valuable consideration
or loan,
and witht notice of y intermediate incumbrance, may by purchasing y first legal estate, obtain priority of y second -

2 Vent 337. Br. Chy. 226. 1. Vern 187. 8. 2 Vesey 573. Strang 240. Pow. 195, 49-216. 228-

The legal and equitable title are on one side and only an equitable one on y other, - The legal Estate as to subsequent incumbrances "tabula in ~~fragma~~ naufragio" - This proceeding is called tacking
"naufragio"

1 Pontifone 300. 2 Vern 599. 2 Atk 50.

Secus if he had notice at y time of lending or giving credit

for he wd then have equal notice with y second, but notice at y time of taking y mortgage, is not material, for he has already made y loan -

A Fortiori, notice at y time of purchasing in y prior incumbrance - does ~~not~~ affect his right to tack - for if one of 2. persons must lose ^{not} each has a right by all legal means to guard vs it -

1. Bern 188. 2 Bern 574. 2 Vent 339. Pow 195. 212. 31. 37.

a Subseqnt incumbrance may tack in ys way not only to y first ~~Mort~~ but to any incumbrance or title, wh earne ²¹⁴ Pow. 198.

a legal Estate ^{mortgage} - An outstanding term or judgment, or St Staple

2 Bern 279. Pow 198. 1 Bern 419. 214

and thus he may obtain a performance even to y

first M^{ort} -

Pow. 229 -

In these y subseqnt incumbrances, hold vs y intermediate - a satisfied mortg till paid his own debt - as y money advanced on y purchase, IE - is a one pd up. y whole amt due on any first incumbrance. n^{ot}ht y arrears ^{up in full - but} of interest on both - ^{released, still carries y legal} legal ^{State -} a judgment satisfied, is one not cancel or released, and it still carries y legal State -

So y rule y^t equitable interests have priority according to y periods of their commencing, admits of exceptions - where one of y parties has more equity to call for y legal Estate ym y other - still carries y legal State - IE. where he has a title in Equity to y legal Estate - tho' not actually vested in him. As a subseqnt incumbrance contract for y legal Estate (as a judgment) and is actually bound to pay for it, tho' it is not actually assigned or paid for - he is preferred to a prior one - for Equity considers as done what ought to be done and wd itself, compel y performance of y contract -

2 Bern 486. 2 Bern 600. Pow. 194 - 204. 12. 81.

But if y prior legal incumbrance attach upon a part only of y estate comprised in y latter mortgage, it will protect y latter as to y part only - As A seized of 50 acres mortgages 20. to B. then y whole to C. and then y whole to D, who purchases y first - D gains priority as to y 20 acres only, But C. shall never have y part witht paying all y^t is due on both y first - and y last mortgage - for there can be no apportionmt of debt -

But if y first incumbrance bought in, contains more yn y third mortgage - y 3^d m^{ee} shall hold y whole, till both debts are paid - As y 2 first mortgages are for sixty acres - y 3^d for 20 - only - y third by buying in y first - shall hold y whole, till y first and third are paid up -

So if a M^{ee} purchases a prior satisfied judgment, mortgage &c - i.e. wh carries a legal Estate, he gains as above -

By a satisfied mortgage is meant, one satisfied or paid off - after forfeiture and so on there is no other yn equitable relief -

For he has equal Equity and y legal Estate, tho' y latter is but nominal in Equity - The last Rule holds, tho' no consideration was paid for y prior incumbrance - Having possession of y prior is satis -

So it has been holden, tho' y prior incumbrance has been obtained by fraudulent means, as where y subsequent m^{ee} came onto a man's study and took out a satisfied St - 2 Vern. 159. 1. Dr. 52.3.

1. Pow. 215.

(thus purchased in) But where any prior incumbrance ^{pur} importing to convey y Estate - is deficient in legal requisites, - it will give no priority to a subsequent M^{ee} as judgment not documented - as required by St 4 et 5. Met M - recognizance not enrolled &c here they do not attach upon y Estate - The legal Estate is not purchased in y case - 2 Vern. 234. 1. PM 346. 2 Equ Cases. 529.

Pow. 215.

A subsequent M^{ee} can take no other yn y legal Estate to his mortgage - As 4 M^{ee} ^{take} purchases in y 2^d, no priority is gained for his own original incumbrance - This original mortgage is postponed to y 3^d - for y second mortgage don't convey y legal Estate - 2 PM 495. 1 St. 773.

he can gain
no priority -

So if a subsequent incumbrancer has not equal Equity with an intermediate one - as a creditor can't by judgment or St

by purchasing mortgage, gain priority to y intermediate mortgages -
for he is in no sense a purchaser and has only a general
lien, not having lent his money on y credit of y land, as
a pledge and so has not equal equity - 2 P Mms 491. 2 Ves. 662 -

Pre Chy 494.
310. 1 Equity Ca
325 -
325.

Pow. 224, 26. 2 Atk 347. 347 -

A Prior mortgage purchased in, will give no priority in
it is forfeited - It's ~~not~~ satis however, if is forfeited at y time
of y suit brot, (I C think) for a Ct of Equity has no concern
with y Estate 'till after forfeiture - Before yt time, y Estate
remains as at C Law. so yt y legal Estate may be devised on
paymt by y M^r - 2 Vernon 156. Pow. 228, 29 -

So yt if Chy sho decree in favour of y 3^d M^{ee} vs y 2^d -
y M^r might defeat y decree Equity dont interpose till
after forfeiture -

So a prior incumbrancer having y legal Estate may tack
a subseqnt sum advanced by him, upon y same security -
to his own mortgage, and gain priority as to y last sum -
vs y intermediate incumbrancer - if he has no notice of y
subseqnt incumbrance, when he advanced y 2^d sum -

As I I mortgages to A. B. C. B witht notice of A's
mortgage, lends more money on y same security, having
bought A's mortgage - B shall hold for y last loan vs C -
for he has equal Equity and y legal Estate - 2 Atk 352. 2 P Mms 494 -

Pow. 229.
2 Ves. 662

So if there are 2 M^{ees} and y 1^d makes a subseqnt loan
taking a judgmt for security - he may tack ys to his mortgage -
2 Atk 352. 2 P Mms 494 - 2 Ves. 662 - Pow. 230 -

But if y first M^{ee} had notice of y intermediate mortgage
at y time of lending y last mortgage money upon y same
security - he cant tack vs y mesne m^{ee} - Equity is unequal -
Pow. 230, 31. Pre. Chy 226 - 2 Eq Cas 54 -

The Same Rule holds where a subseqnt ~~intermediate~~ M^{ee}
purchases y legal Estate to protect her own incumbrance -
ut Supra -

There is an exception to y^e General Rule as to y^e effect of notice, when y^e prior incumbrance is defective - A subsequent M^{ee} wth notice, will have priority over it, ~~not~~ indeed by taking - for y^e legal Estate is "ab initio" vested in him -

Pow. 204. 232.
3 Boen 644-

with

As Mortgage to A by defective conveyance, then to B, who has notice - B has priority. See Quere as y^e Rule - for y^e 2^d M^{ee} ~~with~~ notice - certainly has not equal Equity - with y^e prior incumbrancer - W^d not Equity decree a satis conveyance from M^{ee} to y^e first incumbrancer - E

2 P/MS 491 -
1 Equity Case 320 -
2 Boen 564 -
1 Salk 449 -
Pow 234. 3 Boen 642 -

But a defective Mortgage will be enforced in Equity as a creditor who has only general, not specific lien; as judgment creditor. They did not originally take y^e land as security and they came in under y^e M^{ee} who is bound in conscience, to make y^e conveyance good - Ergo they are postponed to y^e M^{ee}, tho', conveyance is defective - They had not equal Equity -

original contract,

Pow 229. 85 -
236 -

If y^e first mortgage deed contain a clause making y^e land a security for future loans - such loans will have relation to y^e and be taken as a part of y^e original condition, ^{tract} and ergo will be preferred to an intervening mortgage if y^e first M^{ee} at y^e time of making y^e subsequent loan, had no notice -

Pow. 229 - 85 -
236,

Quere y^e incumbrancers in Count will hold y^e as other claimants. I G says, no it appears upon y^e land registry or record -

So too tho' y^e first M^{ee} had notice of it, when he makes a another loan - if y^e second M^{ee} has notice of y^e clause in y^e first - If neither had notice y^e first M^{ee} hold - I G concludes, yt he has equal equity and y^e legal Estate -

In y^e above cases when notice of y^e interest of 3^d persons varies y^e rule of priority - if notice is charged by one party, it must be positively be denied by y^e other - in his answer. Scous tis presumed he had notice -

So if special facts be charged amounting to notice - they must be denied

91.
If notice is denied in y answer, and proved by one witness only - y bill will be dismissed, there not being satis Evi of notice - but oath vs oath -

Secus if there as many circumstances corroborating y Evidence of y witness -

In y case, if y Evi and circumstances are not satisfactory - an issue is directed in a Ct of Law -

Secus Where there are no such circumstances -

According to y proceeding Rules, y right of taking incumbrances - depends on y want of notice in him, who wd protect his equity by y legal Estate - It is then necessary to consider what amounts to notice -

Notice

Notice is of 2 kinds 1st actual, 2^d presumptive -

First - One is said to have actual notice, when he is party to a deed, wh shows y fact in question or has notice regularly served upon him

Pow 256.

But a flying report is not considered as actual notice - as a being about to loan money on a mortgage, a stranger to y contract says to him - B has a mortgage of y same land -

Presumption is a conclusion of law, yt one has had notice of a fact, tho there is no proof of actual notice - Where one can't make a title but by deed, and wh discloses a material fact, he is deemed to admit know or have notice of y fact - As A conveys to B, reserving a power of revocation ^{y reservation,} he ought to have informed himself of it. at his peril -
B conveys to C - C is presumed to have notice of y power of A to revoke.
1. Vern 319. 2. St. 662 - 2. Eq. C. 615. 1. bed. 215 - at his peril -

So if PY devise lands to A, subject to legacies, and a mortgage or conveys y land to B - B is presumed to have notice yt y land is charged yt y land is charged with legacies - Secus it argues neglect, for he desires title under y devise -

There is an exception, in case of y assignment of y testator's personal

charged with
incumbrances -
for y vendee can't
tell how or on
y ~~own~~ vendor is
owner -

propertyⁿ by an executor - The assignee is not deemed to have notice of
contents of y will, in favour of creditors of residuary legatee - Roberts

1 ves. 173. 3 Atk, 236 & 1100 148 150. 2 Bernon. 444 - 1. Atk, 463. Pow. f.C. 637. n

The purchaser can't know y amount of y debts, and of y assets, he will
ergo hold y property - A Purchaser of personal chattels relies on y
possession of y vendor -

Quere as to specific legacies - it seems to be secus -

2 Bern. 616
1 ves. 215 -

It's secus if there is an collusion between executor and purchaser
to defraud creditor - The purchaser wd not hold y property unincumbered -

If a deed creating a prior charge upon y Estate, is delivered to y
purchaser, among other papers, he is deemed to have notice of y prior
charge - As a mortgage made by indenture - The Mee duplicate
is del^d to y subseqnt Mee - before he lends his money -

2 Bernon. 384 -
2 ves. 486 -
Pow. 271 -

2 Atk 54 -
1. ves. 387 -

So a recital in one deed reciting or necessarily implying, y there is
an incumbrance on y land created by another deed, is deemed notice of
y incumbrance to a person, who had possession of y formerⁿ deed, containing
y recital. party

1. Atk. 490 -
522
Pow 270 -

And whatever facts are satis to put y property charged with notice,
upon enquiry, are deemed notice in Equity - As Infants entitled to
an estate, who found a person in possession, when they came of age -
and rec^d rent 11. yrs post - holden y t y s was notice of a lease
by guardian and yt they had notice of it -

Hence it wd seem, yt possession by a prior Mee wd be satis notice
of an incumbrance to a subseqnt one -

1 ves. 61. 69 -
2 do 477-485 -
2 Bern 574 -
Pow. 272-3 -
24 -

Notice to ones attorney, agent, counsellor is notice to himself - As a Mee agent
wⁿ about to lend money to A in mortgage, has notice of a prior
incumbrance - his employer has notice

The Mee holds also, where a person is agent for both parties, as
is frequently y case in marriage settlements - 1 ves. 65. Pow. 274 -

And one makes a person "ab initio" his agent by agreeing to a contract
made in his name by y latter witht authority -

Notice of an act of bankruptcy by Mee, will not be presumed vs
as a subseqnt Mee (lending to y Mee post) ~~for~~ to prevent him

from tacking y legal Estate - Tabbot 65. 2 versn. 599

A Judgmt, the matter of record, is not deemed notice to third persons - ^{incumbrance} of y incumbrance as it don't appear as y title deed - and is not a common ordinary. ^{it creates,} assurance - a prior one

Hence a subsequent Mee may tack, ~~taken~~ an intermediate judmt, for tho' a judmt is matter of Record, 3^d persons are not supposed to be acquainted with it - To prevent tacking, notice must be proved as in other cases - Pow. 283. to 85. 1. Chy Cs. 35- 17a

Quere in Court a suit - ^{y mee} incumbrance being duly registered - St Court 417.8 - In other words - an y town records of conveyance and mortgages are not constructive notice - It seems to be so on principle -

But suppose y 3^d mortgage taken witht actual notice of y 2^d - and before y 2^d is registered, tho' there has been no reasonable delay in y 2^d Mee, in procuring it to be recorded, wd not y doctrine be applied in Court in y case - &c

Yet in Eng tis holden, yt y register of intermediate mortgages in y registers county, is not constructive notice - As y first Mee pos - y 2^d Mee, registers, advances a loan, he may tack - 1. E Cs. 615. 2. do. 609. Pow. 285. 87- 290. 92 -

See Quere as to both Cases

But a subsequent Mee having actual notice of a prior mortgage not registered, will not gain priority by registering, for he has all y notice wh y he intended.

But a subsequent mortgage registered is preferred to a prior one, not registered, if y subsequent Mee had no notice - Cow. 712. 1 versy 64. - 3 alth 640 - 58 664 - 2 alth 275 -

A purchaser for a valuable consideration shall hold as a prior voluntary settlmt, tho' he had express notice by St 27. Eliz -

East 59. The same Rule extends to subsequent Mee 1. E Cs 334. Cow. 280. 711. 1. New Rs 332 -

148. The rule has lately been complaned off and rightly - P. J. concurs Judgm. 432. 433. in case of a subsequent purchaser, or of a mee advancing money post-notice, when there is no actual fraud in y first conveyance in settlmt -

for y first is made void only on supposition or presumption, yt y latter purchaser was deceived -

If one purchase with notice of an incumbrance, and then sells to one who has no notice - y latter is not affected by it -

So if A person purchase for a valuable consideration and with notice of an incumbrance, from one who bought with notice, y last purchaser tho with notice, is not affected by it - as A sells to B, who is with notice, who sells to C with notice - C is not affected, for he stands in B's place - 2 B Chy 61. 4 D. 125. P Chy 51. Tabbot 187. 1. attes 571. 1. E C 331.

To whom M^{ee}s interest in an forfeited Mortgage belongs on his death -

Here, there existed great doubts, an y money due shd be paid to to y heirs or executor, y Mortgage being forfeited -

And this distinction was taken, if a bond was given, and if y condition of y payment redemption was payment, to y ^{mee} heirs or ~~executor~~ heirs or ~~executors~~ - Here y money was decreed to y heir - Pow. 297. 1. E C 326.

1 Bern. 170.

But since Cs of Equity have considered y contract merely personal, tis a rule in all cases, yt y money belongs to y executor or administrator y interest being personal, ni y M^{ee} has manifested a contrary intention -

Pow. 298. 344
479 -

As if he has foreclosed, or aliened, or released, Equity of redemption - & taken actual possession - By these acts he shows an intention to consider his interest as real - Post 80. 132 2 Vent 348. Hardn. 467

This principle operates extremely inter heir an Executor inter

For as y Loan or debt came from y M^{ee} personal fund, so payment shd accrue to y fund - Pow. 299. 301 -

Hence on a ~~forfeited~~ mortgage, y debt must be paid to y M^{ee} adm^r or executor, still y money is not payable to y heir or executor y Mor is not at liberty on y day of payment, to pay either of ym ym at his election - for y is a strict performance of y condition, and here Equity has nothing to do with y mortgage -

of payment -

Aliter if paid after y day, he has then not strictly performed and must ergo pay to y party, to whom y debt belongs, in y Executor - or administrator - Pow. 299. 1. Chy C 283 -

25

The money being paid on a forfeited mortgage to y executor, y heir of y M^{ee} must convey to y heir - y heir being only a trustee - and then y trust is satisfied - *Id* - Pow 300. 2 - Cardis. 49-50

But in Court by *st.* if on y M^{ee} death, y legal title becomes vested in infants heirs, y Exec^r or adminis^r is empowered to release 3 Burr. 1801 - y lien - But y infants themselves may still release, *Id* concisely 181, as in Eng - 3 Burr. 1801 - *St* Court B. 2 p. 120 -

The same power is extended to Guardians -

And if on a forfeited mortgage, y money has been paid to y heir, he is compellable in Chy to pay it over to y Executor -

2 Vent 348. Pow. 302 -

And tho y M^{ee} shd die before forfeiture, in wch case y M^{or} may pay y money to ether at y day - yet y money will in Chy belong to y Executor -

2 Vent 351. Pow 302 -

and if there are several Executors, any one of ym may receive y money and his discharge will be good -

The bequest of a specific legacy by y M^{ee} to y Executor, don't bar his right to y money -

So if a M^{ee} die intestate, y interest belongs to y administrator and he may release it and y heir in possession may be compelled to convey y land to him - This Rule holds, tho there are no debts debts.

If after M^{ee} death, y M^{or} releases to y heir of y M^{ee}, y mortgage being forfeited, yet y administrator is entitled to y interest of M^{ee}.

So tho, y M^{ee} has foreclosed, or he has taken actual possession - in his lifetime -

Pow 304 -

2 Vern 193. 1 ss. 170 -

J. Vern. 4 -

But if y owner of y incumbrance intended to hold it as real Estate, it will be so considered on his death - as in y case of purchaser under a mortgage by an absolute deed, & a redemption of y mortgage on his death, will go to as y Estate intended y money to be purchased wd have gone (ie to y heirs) for his intention was to realise. i.e. to invest his personal property in y purchase of real Estate -

1. Vern. 271. Pow. 300.

Pow. 305.

So if y mee devise his mortgage as real Estate - y heir and not y Executor of y devisee, will be entitled - as devise to A and his heirs - for his intention governs - 2 Burr. 960 - 2 Vern 581 -

So if money secured by mortgage, is articulated by y mee to be laid out in land, tis bound by y articles and goes by law - according to y articles wd have gone - The executor is excluded -

If 2 persons make a loan with their several monies and take a joint mortgage, they are not joint tenants, as common purchasers wd be in such a case - but tenants in Common - There is no survivorship, for y^o is y presumed ^{intention} interest - So if they foreclose y mortgage, and then one dies, y same interest is presumed - 2 Ves. 258 - 3 P. Wm. 115. 3 Atk. 133 - 1. Atk. 467 -

They are not considered as purchasers of y Estate, but as creditors taking security together for yr several debts -

The Interest of Mortgagor's Wife -

Vide Husband et Wife - As y wife by joining with her husband in a fine, may bar y dower, so in y same way, she may encumber it with a mortgage - 1. Vern 294 - Pow. 211.

But her right of dower is precedent to yt of y mee under a mortgage made by y husband alone during coverture - for her inchoate right of dower begins with marriage -

A Pointress of land mortgaged may redeem, and she shall hold over, till she or her representatives shall be repaid y whole with interest - for she has a right to hold y land disincumbered i.e. when she has not joined in incumbering it -

This rule applies to cases in wh y jointure is after y mortgage for if y jointure is before, it will exclude y mortgage -

The same rule holds as to a settlement on y wife, vested

Pow.
307.8 -
Pow. 1 Ves. 15 -

on 312.14 -

in articles not executed - E.G. after articles made before marriage,
y husband mortgages y land, and then marries in pursuance of
y articles and dies - The widow may redeem it (it is upon)
Pow 314 - 3 Bac. 328 - 2 Vent 343 - If articles after marriage -
vide infra -

But if y jointress join post marriage in a fine, mortgaging y land,
she shall pay her proportion on redeeming i.e. $\frac{1}{3}$ of y principal -
and tho' she don't redeem, she must keep down y interest during
estates - i.e. I.G. supposes, if she is in possession -

If y first Mee lends more money on his old security, without notice
of y intervening jointure, he shall hold it as y jointress, y legal
Estate being in him & he having equal Equity -

A jointure settled on mortgaged lands after marriage, if merely
voluntary is void as y 2^d mee, tho' he had no notice -
a hard rule and much disapproved of, tho' not denied - Jointress
may redeem G. trusts -

If y husband before marriage gives a bond to y wife conditioned
to leave her a certain sum, if she survives him - She surviving
may redeem, as a creditor i.e. she may redeem under these
circumstances wh entitle bond creditors to redeem - Pre Chy 307.

2 Vern 480. Pow 316.

If y husband lends his own money and takes a mortgage in y
name of himself and wife and dies - she is entitled to it by
survivorship - and if there are ^{no} assets satis to pay y debt
with it - Secus the i. not, - mortgage as to her being
voluntary -

2 Vern. 683. Pow. 366 2 P. W. 364. Pow 370. 20.

Is now settled yt y m^rs wife in Eng is not entitled in Equity or Law -
to dower in y equity of redemption of a mortgage in fee, ergo she or may sue -
can't as dowerer redeem - It is considered as analogous to a
pure trust, of wh dower can't be predicable -

This Rule was settled, when y wife of Mee was supposed to be entitled to Dower.

The Rule contemplates y case of a mortgage in use before marriage, for a mortgage by y husband after marriage will not affect y wife's right of Dower. 1. after 206. 3. 1. M^o 229. Tabbot 138. 2 Atty 525- 1. P^o 326. Secus in Comt. tis an established rule in Comt. yt y widow may redeem as dowerger. So in N^o 1.

And in Eng as well as in Comt. a wife is entitled to dower in y reversion expectant - on y determination of a mortgage for life or for yrs - & if y mortgage is satisfied - Equity will remove it out of her way.

As husbands before marriage mortgages for 500 yrs to raise portions, and they are paid - Pow 319. 21. Pre Chy 132. 2 Bern 413.

Mortgages by husband and wife of her free hold and his interest in y mortgage money due her.

The husband by marriage obtains no other interest in y wife's inheritance, ym a freehold during joint lives, or at most for his own life after her death by y curtesy. He ergo can't make a mortgage of it, binding upon her, and her for a longer period - y^h as he mortgages for 500. yrs and dies, y mortgage is determined by his death - So tho she joined, secus ym by fine & recovery.

his life -

Secus if she join in levying a fine, in y^o may her land may be mortgaged or aliened, so as to bind her and her heirs - Co Litt 351. a.

2 P^o M^o 125. Pow 337. 41. 2 Bern. 61. 1. Eq. 61.

But acts of y wife after coverture determined amounting in law to a new grant or reexecution will give validity to a mortgage made by both - or by y husband only. As directing tenancy in possession to attorn to y Mee and y deed being in his hands settling y balance of rents, styling him Mee. or acquiescing in his possession several yrs. These acts together are equivalent to a redelivery of a deed.

If y wife join in a fine, to secure a mortgage on her Estate, y estate will be holden, not only for y original sum, but if part of y

be paid if a further sum is borrowed for y^t also - for y^e M^r has y^e legal title and as much equity to have his money, as y^e wife or her heir has to have y^e land -

If y^e wife's land is mortgaged to secure y^e husband's debts, his personal estate shall on his death, be applied to y^e discharge of it - tho' y^e wife levied a fine and exclusion of y^e legatees, her equity being totally higher yⁿ theirs -
Pow 343. 1. D. M^r 264. 2. Vern. 604-89-

Tho' y^e wife incumber her jointure by a fine to secure his debts yet she does not by y^e act. absolutely part with it - 1. Vern. 213.

Where y^e incumbrance is paid off by y^e husband, there results for her a trust in Chy. to her jointure -
Pow 346-

If y^e wife joins in incumbering her own Estate to discharge her husband's, and he dies - she is considered in Chy as to his heirs as standing in place of M^r and is entitled to satisfaction ^{out} of his assets -
2 Affs 384- Pow. 2 346-

If a feme sole marries and upon y^e marriage, her husband makes a settlement upon her in consideration of her fortune, y^e is considered as a purchase of her mortgage, and if he dies, she is considered as to his heirs as standing in place of M^r and is entitled to satisfaction out of his assets -
Pow. 346-

If he dies, the living, y^e mortgage will go to his executors -
"The rule" does not hold, it seems, in case of a voluntary settlement post marriage - It is then regarded as a purchase -

So a settlement post marriage in considⁿ of an addition to y^e wife's fortune, is not a purchase of y^e accretion - There is no contract on y^e wife's -
She can't vend her fortune -

And if y^e settlement tho' made before marriage, is expressed to be in consideration of part of y^e wife's fortune, tis not a purchase of y^e rest

So an executory agreement to settle a jointure in considⁿ of y^e wife's fortune, is a purchase of y^e wife's fortune, (ut supra) tho' she dies before it is made -

provided, he is in no default. *Actus rei facit injuriam remanere*

A Settlement by y husband is not a purchase of y wife's mortgage, if it falls short of y value agreed on, and she will hold y mortgaged property vs even his creditors.

But y husband is entitled to y wife's mortgages, as choses in action, if he reduces ym into possession during coverture, tho' he make no settlement, as if he collect y debt. 1. 27. 55.

But an alienation or assignment of y mortgage by y husband, is not reducing it into possession within y Rule, ni it is for a valuable consideration. — If voluntary, y assignee has no better claim ym y husband, himself, or heirs, were it not assigned. —

2. 125. 170.

2 Vern. 401. Pre. Chy 118.

If y husband's creditors get possession of y wife's mortgage, so y't she is obliged to apply to equity for relief. If it will not interfere to take y advantage from ym.

The interest is assigned to y husband's assignee (he being a bankrupt) and all y writings delivered to ym.

But if she had renewed, and y creditors were obliged to apply to Equity, y't it wd not interfere in yr favour for y same reason.

There if they wd make a reasonable provision for her, since y't it wd not interfere in favour of y husband on y's condition. — 1. P. M^o 458. 3201

Pow 327. 8-9. 2 P. M^o 316. 1. 220 382-459.

But Equity will interfere in y wife's favour if a specific assignee of y husband for valuable consideration, of y wife's mortgage — he gives credit to y property, not to y person and so has a higher claim in Equity, ym y husband's or assignee's under a commission of bankruptcy and a higher equity, ym y wife. — 2 Vern. 270. Pow. 360. 65.

But of what funds mortgages are to be redeemed.

It is a general rule y't y fund wh has been increased by contract or y debt, shd be charged in y first instance with y payment.

Ergo on y Mor's death, his personal property is to be first applica-
 to y discharge of y mortgage - The Executor then if he has assets, is
 compellable to advance y redemption money for y benefit of y
 heirs - Secus if y Mor showed a contrary intention -

B. & C. 520. 3 P. M. 356. Pre. Chy 61. Talb. 449. Talbot 54. Pow. 368. 410. 16-

And tho' y heir is unable on y bond, yet he may compel y executor
 (y executor having assets) to satisfy y debt -

The same Rule exists in favour of devisee of y equity of redemption -
 He is "heres factus" et non Heres natus. Pre Chy 470. 1. Atk 487 -

Pow. 370 -

If y Mor bequeaths his personal estate among his relations,
 still it must be applied to y foregoing cases to discharge y
 mortgage, for y Mor's claim is a debt and y personal fund of y
 Mor is first liable for debts - Pre Chy 61. 477. Talbot 454 -

2 Bern. 701 -

Where does y rule extend to any other cases y n residuary
 Legatees?

Secus if y testator direct secus - as if he by will exempt his
 personal fund

And tho' y real Estate ^{of y testator} is charged by him with y payment of y debts -

Yet y renders it only liable for y deficiency of personal assets -

But if y Real Estate is devised to "be sold" for y payment of debts, y
 personal fund is not applied in case of y real

1. Leav. 203. 2 Bern. 718 -

Here y testator's intention to subject y real Estate in y first instance,
 is apparent. Ex - Mor devises his real Estate, wh includes his equity
 of Redemption, to A, and his personal Estate to B. and charges both
 with his debts - The personal is first applied to all debts - Secus
 if y eqty of redemption were devised "to be sold" to pay y mortgage

And The rule yt y personal fund shall be applied to disencumber
 y Real Estate, is not now allowed to operate in favour of y heir, to y
 prejudice of Simple Contract creditors ^{and} Tho' it is holden in favour of
 y heir as vs y Executors and residuary Legatees - "General Legatees" seem
 to be contradistinguished from residuary Legatees - Pow. 385. 6 -

Gen Legatees

Specific
 Substitutes

And if y specially creditors resort to y 'personal fund' and exhaust it, y simple contract creditors and general legatees may resort in Equity to y Real Estate "pro tanto" so yt y simple contract creditors and general legatees are preferred to y heir

The same Rule holds in favour of simple contract creditors and general legatees vs y Mor's devisee i.e. residuary leg. devisee - *Semb. infra*

It holds in all cases in favour of y creditors and general legatees also, in y devise is specific - If then y devise is general or residuary, they may resort to y Real Estate, "pro tanto" at *Supra* -

Pow. 386. But if one devise his real Estate as an Equity of Redemption, specifically and dies, leaving debts and legacies, and y specially creditors exhaust y personal fund - y General Legatees can't come upon y devisee, "pro tanto" For y devise is specific and such a devise seems contradistinguished from a residuary devise -

All my real Estate is specific, y rest of my Real Estate residuary.
Pow. 382-4. 91-

When y descent is broken and y heir at Law of y Mor made to take by purchase under y devise, he, if y devise is specific - will fall under y last Rule - He is then a specific devisee -
As a Mor tenant in fee devises to his eldest son in tail -

On y other hand y heir of Mor is not entitled to y aid of his personal property, specifically bequeathed -

Money may be y subject of a specific bequest, but it must be so circumstanced yt it may be identified, i.e. distinguished from all other money of y Testator - Ex. 100. dolls. due on P.P. bond -

Thus if y Mor devise y Equity of redemption to A and 100\$ on a bag, or a certain lease to B - A is not entitled to B's legacy to disencumber y Estate -

But to render a bequest of personal property specific, it must be certain, and defined - As. 100. dol. witht more is general

but 100. in such a case, or due on such a bond is specific -

Tho a Mor devise his Estate with y incumbrance thereupon, yet if there are no other words showing an intention, y^t y devisee shd take cum onere - y personal funds is first to be applied, according to y above distinction, to disincumber it -

And if there appears on y face of y Mor's will, a clear, positive intention y^t y devisee shd hold y Estate, disincumbered, even y Real Estate in y hands of y heir shall be applied to disincumber it - As Mor devises an Estate an Estate in fee, and an Estate to A. for 3 lives (y^s being all his lands interest -) then purchases y ^{reversion} revocation of y latter, wh is a revocation as to y^t, Here is a clear intention to disinherit y heir - 2 Atks 424 - Pow. 393-98 - 38. 403-405 - 405.

If a Mor sell or assign his interest, y heir of y assignee has no claim - on y assignees death, to his personal assets - As disincumber y land - for y personal Estate of y assignee is not increased, but diminished - by y purchase - Pow 410-412 - 1 Br Chy 101-454 -

Same rule holds as to y assignees devisee -

So if y money due on mortgage is not properly y debt of y owners of y Equity of Redemption, y Estate mortgaged shall share on his death, bear y burden - His personal assets, are liable, for his personal fund has not been benefited -

As Mor's heir pledges his own lands as personal security and then devises y land to A, y devisee shall not have aid of y personal fund -

The interest of money ^{received} ~~decreed~~ by mortgage -

Usurious interest in Eng by 12. ann - is 5 per ct, In N Eng. 6 - At y G. O. Y. Georgia 8 - The General Rule is, reserving more, makes y contract void - recovering incurs y penalty -

As y reservation of illegal interest avoids y contract for y repayment of y loan - So it makes void a mortgage given to secure it - This said by La Hardwick, y^t if a mortgage is drawn for, 5 per ct, and y mee receives 6 - y mortgage is void - 3 Atks 156. Pow. 421 -

This must mean receiving in pursuance of a private original agreement - or a receiving at y time of y loan, amounting to an illegal reservation -

Is also holden by sd. maxim - y^t a contract made in England, for a mortgage of land in y^e M^t Indies, is valid, if more y^e 5 per Ct - is reserved - tho y^e rate of Interest - is higher, there -
 In y^e case the payment is to be in Eng^e & y^e County - 3 Atk 727. 1 Ves. 428. Pow. 21.

There is a distinction in Eqy between an agreement to pay 4. per Ct - with a clause of increase to 5, if y^e debt is not punctually paid - and an agreement to pay 5. with a clause of reduction - Ic - The latter is enforced, y^e former not - A penalty is not enforced in Equity -

a distinction of no practical use, if y^e parties made it, as they may always by y^e form of y^e contract - 2 Vern. 209. 316. Pre. Chy 160. 3 Atk 520 -
 3. Pk. 432. But a covenant or agreement, after interest has accrued - to pay y^e additional one per Ct, is good in Equity -

being considered then as assessed damages - not as a penalty -
 Pow. 424. Pre. Chy 161. Ora. 37. 2 Vern. 134 Lath 449.

So an agreement (ut supra) to raise y^e interest from 4 to 5 - on non-payment will be good in Chy - if in consideration of it an indulgence by way of forbearance, be actually given to Mor. It is not a penalty in y^e case - but a liquidated satisfaction. As where on non payment y^e M^r sent y^e account to y^e Mor who admitted it and desired forbearance wh^{ch} was granted on y^e Mor agreement to pay y^e condition -

Interest upon interest in arrear, is not regularly allowed -

But if y^e M^r assign with y^e concurrence of y^e Mor - all y^e money paid by y^e assignee and wh^{ch} was due to y^e assignee, will be considered as principal and draw interest - Here interest on y^e original interest is allowed - Is in y^e nature of a contract, between y^e Mor and assignee. y^t y^e latter sh^d pay his debt and in y^e meantime y^e assignee actually pays interest on y^e original interest; or does what is equivalent - parts with his own money in paying y^e interest due, as well as y^e principal - 1. Vern. 169. 2. do 135. Pow 426.

Aliter if y assignmt is with y mortgors consent, or concurrence, it wd be allowing mee alone to convert interest into principal -

Secus if y assignee has not paid y money, y assignmt is only colourable to load y Mor with compound interest

The account between y mee and assignee, as to y amt of y debt is not conclusive on y Mor - He is no party to it -

It was once holden yt a Mee of mortgage being forfeited, shd have interest upon interest -

This Rule was soon exploded -

The report of a Master in Chy computing interest makes it interest principal, from y time of y reports being confirmed - Ld a judgment of Ct

But a masters account vs an infant in a bill to foreclose, don't regularly carry interest on interest - for one reason for allowing interest on interest, in common cases of yd kind - is yt y Mor is guilty of neglect wh cant be imputed to an infant -

But if y infant is Ptz in Chy - on a bill to redeem, y account taken by y master carries interest on interest - y Def in Chy in such cases is allowed a full benefit of proceedings in wh he is forced by y infant -

So of an infant entitled to an Equity of redemption, agrees to pay interest on interest and then procures. It is allowed vs heir

But y Mor merely signing an account, wh admits yt so much is due - as interest, don't turn into principal - don't amount to an agreamt for yt purpose - 1. R. 11m 652. Pow. 439 -

So an agreamt at y time of y mortgage, to turn interest arrear into principal, i.e. to pay compound interest, is not binding, it is oppressive - but post interest has become due, such an agreamt is good -

If y Mee in possession has expended money in defence of Mors title

when impeached, he may add it to y principal, and it will draw interest -

A Tenant for life of y Equity of redemption, is compellable by y remainder man to keep down y interest during his estate, and by purchasing y mortgage y latter may, compel y tenant for life to redeem by paying $\frac{1}{3}$ of y debt or quit possession -

But a Tenant in tail in possession of lands mortgaged, is not compellable by y remainder man, or reversioner, or issue in tail, to keep down y interest - For they are in y power of y Tenant in tail, and may be barred by fine or recovery

The same Rule holds in favour of issue in tail as y remainder man, and reversioner and for y same reason -

But if y tenant in tail of mortgaged land, is an infant, and his guardian in possession, he is compellable to keep down y interest, for such a purpose Pow. 444. Tath 567. 2 Atk 427. 1 Ves. 471-480

If y tenant in tail does keep down y interest, y remainder man shall have y benefit of it, &c. is not compellable to reimburse y tenant in tail or his representatives 1 Ves. 477. Br Chy 218. Pow. 445 -

For y remainder man's interest is so remote, quo ad y probability of enjoyment, yt it is deemed of very little, or no value. He ought not to be compelled to contribute, where y probability is, yt he never will be actually benefitted -

^{1st}
If y Mee enters and then permits y Mor to take y profits without paying y interest, - still in favour of y 2^d Mee, y profits shall be applied to y first Mee's interest, so yt y first Mee interest shall not keep out y 2^d Mee any longer, yn if y interest had been duly paid - & y profits - otherwise y 2^d Mee suffer -

For he is prevented from availing himself of y ~~Mee~~ profits - by y first Mee's act - &c. Jone Chy 30. 1 Ves. 270 - 3 Punc. 658 -

Pow 43, 453. 68 -

Where a bond is given to Mee, y holder of it, being fairly possessed of it - has of course a right to receive y whole principal, and interest - for he has y control of y debt, so yt he may extinguish

107.
it. by giving up y bond to y Mor—

But y holder of y mortgage deed has not by possession of it, authority to receive more y n y interest— This he may receive, because, he may command y possession— But giving up y deed to y Mor no not reest y Estate— y debt is y principal— As y Mortgage deed pledged by y Mortgage and del^d by y pawner to y mor— *1. E. 158, l. 1. Vern. 150—*

1. E. 145—

209—

If y Mee refuse to receive his money post forfeiture on tender made— he loses y interest in y debt from y tender— proviso y Mor give notice of his intention to pay 6. calendar mths before hand— and tenders y money on y very day wh he appoints— Secus y interest will be allowed

1. E. 318. 19. Pow. 454 5—

This notice is required ^{quia} y day of paymt is past— Such tender will also bar y Mee's executor or devisee of y interest—

But in these cases y Mee must make oath, yt y money has been always ready for y Mee since y tender, and no profit made of it— Secus y interest will run on— This oath may be contradicted—

Pow. 455—

2 P. 1111 2 378— 2 Ch. 206

And in general there must be a strict legal tender, to stop y interest—

2 E. 643—

2 Wes. 372. 678. 3 alms 90.

But tender of a bankbill has been holden good, where y Mee made no objection to y legality of y tender— and y Mor offers to exchange it for money— if y Mee wished it—

due on a mortgage

The money (being a sum in gross) is regularly to be tendered to y person who is of y Mee, if no place is appointed in y contract— (tendering upon y land, y Mee being absent) is not satis— *Co Litt 210. B. 2 E. 61. Case of*

(mortgage)

Pow 456—

610

Kent—

But if y time and place are appointed by y parties, tender must be made at y time and place—

So if no place is appointed in y condition and mor gives notice where he will pay, tender at yt place is good, if y appointment is a reasonable one— and no objection made to it by y Mee, when y notice is given—

And in some cases tender at y mee's house in his absence will be satis,

when no place is expressly appointed, as if y Mee willfully keep out of y way

But if y Mee has doubts as to any legal question arising out of y transaction, he ought to have time to consult counsel, before y interest shall stop on terms made - as Mor present, a deed of conveyance to be signed by y Mee, and containing covenants of £30-

So if there is a question as to who y equity of redemption belongs - no recovery ought to be made, till y point is settled -

The interest reserved upon a mortgage may be altered by a parol y ant of y Rule agreement subsequent - as interest reduced from 6. to 5 per Ct - if y Mee. Quere in y case decided y Mee was Plf - it was rebutting on being a bill Equity - no such an agreement be allowed in favour of Mor - to foreclose, y when Plf-⁵⁵ This rule is incorrect, 6 Bm. PC 580 - Pow. 460.2 Mor may rebut and no not an agreement to increase y interest be good as or rather may him when Plf - allege y agreement

Of y method of accounting

The method of accounting

The mortgage being a pledge, not an alienation, y Mee has no right to y rent - till he takes possession - the Mor, therefore, is not bound to account - or rather account for y profits during his own possession - He is to pay interest on his debt and recd y profits during his possession -

2 alk 107. Doug 266. Pow - 81- 464

But y Mee must account for y profits during his possession, they are to be applied to discharge y debts - It is in nature of a bailif "quo ad account" Pow. y profits, he y Mor's - So y ultimately y Mor's - 2 alk 534. 1. Bm 470. but G says no

Pow. 464. more

This means If y Mee in possession manages y estate himself - he has no allowance he can have for his care, but his time and labour are to be taken into y account - no salary - he trusts for y purpose of ascertaining y nett profits of y Estate - regularly -

The same rule holds, tho there is an agreement to y contrary - to his labour shall be allowed - to prevent oppression - 2 alks 120 - Pow. 466 -

Secus if he employs a skilful bailiff

1 Bm 316. 3 alks 518 - Pow. 466 -

1. Eq. C. 328

3 Bac. 658

658. Pow. 467
467.

If y Mee in possession assign^{his interest} to an insolvent person, without y Mee's assent, y Mee is still answerable for y profits, as well after assignment as before - so as he no lose y m. y assignee need not pay -

The mee is to account to y Mor. only for y actual profits rec^d. (not as y case may be for y actual annual value of y land) in it appears, yt he might make more, but from fraud or wilful neglect as if he had refused a responsible tenant, who wd have given more - and y profits amt to less. 1 Vern 45. 470 - 1 Eq. C. 328 3 Bac. 657

If y Mor prove yt y Mee let y land at a certain price, at a certain time, yt will be consid^d y price during y whole time, ni y Mee prove y contrary -

But if y Mee take possession, and keep other creditors out, he will be charged in their favour, with all y profits, wh he might with due care have rec^d after his entry - As having taken possession, he allows y Mor to take all y profits - 1. Vern. 270 - Dec chy - 30. 3 Bacon 658 - Pow. 668 -

Still he is not bound to account with subseqt mee's / where he allows y Mor to take y profits for any profit accrued before he has notice of y subseqt incumbrance - He is in no default, ^{if} then - till
Pow. 468-9. 2 Chy R. 204

If y mee permit y Mee in possession to make use of his incumbrance - (his title deed) to keep out y creditors, he will be charged with y profits in their favour, from y time when they might have had possession - but for his interference - As Mee permits Mor to use his incumbrance vs y Mor's assignees - he being a bankrupt - This is called "Fencing" - Fencing - 1. Vern. 267 - Pow. 469 3 Bac. 658 -

If y Mee who has been in possession, has assigned, and a bill for redemption is brot vs y assignee, ytt y Mee must be made a party, - yt he may account for what he has rec^d - 1. Eq. C. 594 - Pow. 471 -

If there are several mortgages, an account stated between y first Mee and Mor, will be conclusive upon all y rest, ni fraud or collusion or mistake be proved - &c prima facie conclusive - 1. Eq. C. 12. Pow. 471 -
3 Bac 659. Doere. ni taken under y authority of y Ct, as before a Master &c.

But y account between y Mee and assignees, will not conclude y Mor,
for y profits are his. — He is a debtor and shd be a party to y account.
Pow. 472. 1. Chy C - 68 -

y Ultimate. An assignee after several assignments, is not bound to account for
y profits before his own time, i.e. y former profits shall not be taken
into y account as him. — They shall be sett off as y previous interest —
and y reason is, y difficulty, of stating an account of all y profits
in such cases. — Pow. 472.3 - 1 Chy C 102 - 2 Chy R. 392 -

If y Mor after having attempted to defeat y Mee's title at Law -
causeth a bill to redeem, all yf Mee expensed at Law in
defending his title, shall be allowed him in y account.

2 Bern. 536 -

There are 2 modes of taking y account between Mor and Mee -
One by making annual rents, i.e. by applying an annual surplus
of y rents and profits over y amt of y interest, — to sink y principal -

might
with making
any Rents
Rents -

unusually -
The other mode is, by bringing all y profits in one aggregate, sum -
and all y interest into another -

Where there is a surplus of rents and profits, y former mode is y
best for y Mor as it lessens y ^{amount} of y accruing interest -
each yr by annually redeeming y sum wh draws interest -

The Rule is, yf y yearly rent greatly exceeds y interest of y debt
annual rents are to be made - & new not -

at a ^{least} Master is not bound to apply every small sum
or excess to y principal - 2 Wms 536. Pow. 474 -

Foreclosure

Chy ~~will~~ after forfeiture will in favour of y Mee decree a redemption
So in favour of Mee, y same C will decree a foreclosure, i.e. will order
yf ni y Mor pay y debt within a limited time, he shall be forever
foreclosed or barred of his right of redemption, wh order is irrevocable
ni under special circumstances - Pow. 510 -

If a mortgage is of a reversion, a decree may had in favour of y Mee
for y sale of y Estate (if not redeemed) to pay y debt, — quia in such

cases y Mee can't avail himself of any present profits of y lands -
 Aliter where an Estate in possession is mortgaged -

If a mortgage is made to several, all must be made parties in a bill for foreclosure - to prevent a multiplicity of suits and a Ct of Equity goes ^{substantially} ~~substantially~~ ^{or nihil} ~~substantially~~
 Equity will never decree a foreclosure till a forfeiture of y mortgage - ~~is~~
 till then y Equity of redemption don't exist - y Estate is redeemable at Law -
 2 Vent 365 - 1. Rem. 232 - ~~ex parte~~

On a bill for foreclosure y title of y Mee can't be investigated - 1 E. Chy
 on such a bill won't aid his legal title, but will leave it, as it is,
 to be settled at Law - The decree only destroys y Equity of redemption
 Pow. 476 - 2 Chy C 244 -

If y mortgage deed is defective, y Mee may compel y Mor to make
 it good on bill for yt purpose, but not on a bill for foreclosure -
 y Mee may pursue all his remedies at y same time - viz sue for y
 debt on y bond &c - for possession in ejectment - and for foreclosure
 by his bill in Chy -
 2 Atkes 344 - Story 401 - Pow. 477 -

But under special circumstances, y Ct will grant an injunction
 to stay y proceeding on y Ejectment -

Chy may refuse to decree foreclosure, when injustice w^d be done
 thereby, as Mee having notice of a voluntary family settlement, procured
 y trustees to convey y legal Estate to heir to protect his mortgage -

Left to his remedy at Law. Unfairness - Breach of Trust in
 y Trustees -
 2 Vernon 277. Salt 680. Pow 237 - 478 -

The Mor ^{paying} relief as y Mee, is equivalent to paying a ~~+~~ redemption -
 for redemption is y proper relief -

If upon reference to a Master to take y account on Mee's bill ^{a mistake} ~~Foreclosure~~ ^{Foreclosure}
 to redeem - he does not redeem by paying y money according to
 y order and y Ct on y Mee application dismisses y bill - on y
 account. y dismissal is equivalent to a decree for foreclosure -

2 Atkes 267 - Pow. 479 -

If y Mee's heir brings a bill for foreclosure, tis good cause of demurrer,
 yt y ^{nee} ~~nee~~ executor is not a party - he being entitled to y money -

So if it appears on y hearing yt y Mee's adm - or ex^{or} ~~ex~~ is not party -

y Plf (y mortgagor's heir) can't proceed, tho' there is no demurrer.
Pow. 479. 2 Chy Ct 29.

But y Mort's Executor need not be made a party to y bill for foreclosure. He has not y Equity of redemption. 1E on a mortgage of a free hold. 3 PMm 333. n. Pow. 479-80.

But if y Mort's heir has obtained a foreclosure, it will be good, tho' y Executor were no party. For y heir may ^{retain} y land, on paying y debt to y Executor or adm^r. 1 Vern. 367. 2 Do 66.
Pow. 480.

But if y heir don't pay y mortgage money to y Executor, y Executor may compel y heir to convey y land to him - 2 Vern. 67-193 367.
Pow. 303-480-1 Eq Ct 328.

In a decree to foreclose within an certain number of mths, y term is computed by calendar mths. not Lunar. 2 Eq Ct 605. Pow. 481.

This is a rule of Equity.

A decree to foreclose a tenant in tail of an Equity of redemption - will bind y issue in tail, and all those in remainder. tho' they are not made parties.

The Mee thus acquires all y right of y tenant in tail and y remainders were all in his power. Pow. 481. 1 Chy Ct. 217.

But if there is a tenant for life of an Equity of redemption, with remainders over, y remainder man ought to be made a party to y bill for Foreclosure. He is not in y power of y tenant for life -
2 Atk 101. Pow. 483.

If there are several incumbrancers, some of whom are not made parties to y bill, still y Plf may foreclose such as are made parties - As y Mee. The 1st mee makes only y 3^d a party - He is bound by y decree. Pow. 483. 2 Vern. 518. & 663-183. Pow. 492.

But those who are not parties to y suit are not bound by y decree and of course have still a right to redeem - *Supra*

Where all y Mee's interest is devised away, y devisee may bring a bill to foreclose without making y Mee's heir a party - He has no interest - 1 Eq Ct. 318. Pow. 485.

And an infant may be foreclosed, but a day is given to him to show cause vs y decree - when he comes of age - 1E. within 6 mts afterwards - This 6^{mts} is called y day -

The words of y decree, are, y^s decree is to be binding on y said a B. in he shall within 6 mts. Sc. being served with process for y purpose, show good cause to y contrary -

183. 3 Bac. 183.

Pow. 486 -

2 Vern. 392. 42. 479 - 1 Do 295. P. Chy 185 - 2 Bed. 23 -

If y infant show no cause within 6. mts. y decree is made absolute upon him - But where he shows a cause, he may on motion, put in a new answer and make a new defence -

2 Atk. 532. 1 P. Wms 504 - 2. Do 401. 3 B. P. Chy. 301 -

The process is to be served on y infant's coming of age, he not allowed to go into y account anew - of course, nor is he allowed or entitled to redeem of course on paymt, he can shew only yt 1E. he cant. do y^o y decree is erroneous - or unjust - 1E he may take advantage merely quia he of any reasons yt existed at y time of y foreclosure & sh if they was an infant but must shew had been then urged wd. have prevented y decree - and good cause - in y^s way he may open y foreclosure - 3 Bb. 369 - 3 Bac. 148 - Pow. 486 -

3 P. Wms. Pow 489 - 490 -

But it is said, yt where an infant, owns y Equity of redemption, y meet's proper remedy is a decree yt y Estate be sold for y payment of y debts - This binds him within a day after age - For there is no forfeiture, y surplus, being his - But even then if he is decreed to join in y conveyance, he must have a day -

But if a feme Sole or her ancestor mortgages land and y Equity of redemption rests in her during coverture - a deed or bill to foreclose is peremptory - She has no day given her to show cause vs it, as an infant has - She is under no natural incapacity to act for herself and has voluntarily delegated y right of acting for her to her husband -

3 P. Wms 352. 1. Ves. 305. 3 Atk. 712 - 10. Do 43 - 43a.

Hobart

But tho' no day is given her by y terms of y decree, yet it seems, yt after coverture, she may avoid y decree, if there is just cause - as quia there was fraud - or plain mistake

2 P. Wms 450 - 3 Do - 238 -

If y Mee is guilty of any unfair conduct in obtaining a foreclosure, y Ct will open it, i.e. revive y right of redemption, as Mee obtains a foreclosure, pending a suit by Mor creditors to have y land sold, for y paymt of debts, opened in their favour.

2 Eq Ct. 609-610. 2 Vern 601. 2 Eq Ct 600. 9- Pow. 491-99. 2 B & C 544.

So if y Mee obtains foreclosure after, y judgment creditors of y Mor have given notice of their demands and tendered him paymt-

2 Vern. 185. Pow. 492.

Secus if y Mee had no notice. Quere

Where a foreclosure is opened in favour of a subsequent incumbrancer, y first Mee shall be allowed all his expenses in obtaining y foreclosure

2 Vern 185. Pow. 492

This Rule holds, if y foreclosure was obtained by unfair means.

The time limited for paymt on a decree for foreclosure, may be enlarged upon special circumstances, as if y Estate is of much greater value than y amount of y debt - may be enlarged several times - y reasons continuing - Chy has y power of opening it in all cases -

2 Eq Ct. 605. Barndis 221. Pow. 493-4.

1. Chy Ct 63- 50 where y Mor was prevented from paying by y rebellion, y time was enlarged. I think in all cases of inevitable accident -

1 B & C 53.
Pow. 494.

A foreclosure is not opened in favour of a mere volunteer or devisee - or y Mee has at least equal Equity, and an absolute Estate at Law.

1. Eq Ct 318. Pow. 494.

On *Witch Metch* mortgages there can be no foreclosure, there is no forfeiture - 1. Ves. 406. Pre Chy. 423. 1. P.Ms. 291.

If y first Mee having obtained a foreclosure as y 2^d devise y land to y Mor, y foreclosure will "ipso facto" will be opened in favour of y second as y Mor - 2 Vern 235. 201-148 - 1. Atk 270.

The 2^d mee's claim on y land is thus revived -

The 2^d mortgage deed is an estoppel to y Mor - who now has y legal Estate - For y legal title is now vested in y Mor, and as to him, y 2^d mee has a plain equity ~~of~~ to claim his original lien - y debt being unpaid -

And if y Mee having obtained a decree to foreclose, sues on his counter security (as his bond) y is a waiver of y foreclosure

for he can't collect y debt and still hold y pledge -

1 Eq C 317. Pow. 505. 496 - 2 Drown PC. 119 -

A Foreclosure is not regularly opened when y Mor has acquiesced for several yrs. in y Mee's possession under y foreclosure -

2 Pow PC. 111 - 1 Pow 202 - now regularly - 3^d Comm. Re. 612 - Pow 499. 500. 1. 10 - 1. B Chy 14

2 Eq C 177. 599 -

In Eng. y practice is. if y Mor don't pay y debt at y time limited - to make y decree absolute by a further order - Pow 499. 500-2 -

Chy in Eng is always open - Secus in Connt.

If y tenant in tail of an Equity of redemption, suffer a recovery - and sell part of y land on a bill to foreclose, or compel a sale - y part sold shall not be affected, if y residue is satis to satisfy y debt -

Times
of
Mortgages -

Mortgages 62. Interest of M^{or} in the mortgaged Premises 68. Equity of Redemⁿ who may claim it 71. of a devise of Lands mortgaged 83. Priority of Incumbrances and of Tacking 85.

Notice 91. To whom M^{or}'s interest in an forfeited Mortgaged belongs on his death. 94. Interest of Mortgagor, wife &c., Mortgages by Husband and wife of her Freehold and his Interest in the Mortgage money due her 98.

Out of what funds Mortgages are to be redeemed 100. The Interest of Money secured by Mortgage 103 -

Method of Accounting 108. Foreclosure

Estates in Joint Tenancy)	129.
Estates in Coparcenary	136.
Estates in Common.	139.

Estates in Severalty, Jointenancy, Coparcenary and Common - These

under former titles, are considered with respect to y quantity of interest, in y owners, and y time of y^r enjoyment - Now to be treated of in relation to y number and connections of y^r owners -

¶ an Estate holden in severalty, is one of wh there is only one owner - during y continuance of his interest - Ibid - 2 Mod. 112. 2 Pb. 179 - all estates are supposed to be in severalty (when rules are laid down respecting ym) in they are declared to be secus - Ibid -

Estates in Jointenancy

This is an Estate in land or tenemts, granted to two or more - and it may be in fee simple - fee tail, for life, or for y^rs - or at will - Litt 2. Sec - 277. 2 Pb. 179. 2 Mod. 124. 2 Bac. 188. Title of Tenants -

1st P. as to its creation. It is always created by purchase i.e. by act of y parties, never by descent or act of y law - as, it may be created by devise - deed - fine or any other common ^{law} assurance - 2 Mod. 124. 2 Pb. 180-8 -

2nd If an Estate is given to two or more, with words denoting any intention, yt it sh^d not be a jointenancy, it will be such - as Grant to B. & A., and y^r then heirs - They are Jointenants in fee -

Secur.
in R. &
C. 11 -

But if land is granted to two, to be holden 1 half to 1. ^{half, to another} 230 - they are not Jointenants - but tenants in Common -

Litt 2. Sec. 298. 2 Pb. 193 -

In com. the persons, have an interest in the unity, which is unity - Unity of interest - Title. Ten - it possession - i.e. Jointenants have one and y same interest, arising by one and y same conveyance, at one and y same time, and holden by one undivided possession -

Ld Ray 311-12 - 2 Pb. 180 - 2 Mod. 128-9 -

192.6.

1st, Unity of Interest the can't have one quantity of interest, another - as for life and y^rs - If so they are not Jointenants - 2nd If y Estate of one is in possession, and y^t of y other in expectancy - 2 Pb. 180.1 - 2 Mod 124 -

If a grant is to A and B, for their lives - they are Jointenants - of y^e Freehold - and each has an Estate in y^e whole for life of his companion and for his own life - Wd it not be correct to say, yt each has an Estate for y^e whole for y^r joint lives - and y^e survivor y^e Estate for his own life, after y^e death of his companion - 2 Bl. 181. 187-

If to A and B, and y^r heirs, they are jointenants in fee - and y^e inheritance goes entire to y^e heir of y^e survivor -

Litt Sec. 2. 80 - 2 Bl. 187-

If a grant is made to A and B for y^r lives, and y^e heirs of A for y^r respective lives - and A has y^e fee in severalty -
 more correct, 2 Bl. 181, Litt 285- they are tenants for y^r lives - Wd it not be, if A shd survive B, tho' for y^r respective lives - if B survives A -

So if a grant is made to 2 men and y^e heirs of y^r bodies, or 2 women &c - or to a man and a woman who cant intermarry, as brother and sister, and y^e heirs of y^r bodies, they have a joint Estate for life - but from necessity several inheritance - For no person can in either y^e cases, be heir of y^e bodies of both - In y^e 2 former it is physically impossible - in y^e latter legally so - 2 Modes. 127.6. Co Litt 184. a -

Litt Sec. 2. 83.

The issue of each will therefore have a moiety - after y^e death of both and hold as tenants in Common &c.

And if either of y^e donees die without issue, his moiety reverts on y^e death of y^e survivor to y^e donor -

Same Rule holds, when an Estate is given to one man - and two women, and y^e heirs of y^r bodies, and "vice versa" - Co Litt 184. a -

If to a man and woman who may intermarry, y^e heirs of y^r bodies - The inheritance therefore goes entire to y^e heirs of y^e body of y^e survivor (as in y^e case of Jointenants) in fee to his heirs in general -

Co Litt 182. a - Litt Sec. 2. 83.

Id Ray 312.4 - Second Unity of Title - y^r estate must be created by one and y^e same act, and y^e same conveyance or disseisin -

Litt Sec. 2. 78 - Because they wd have difficulties, wh^{ch} wd destroy y^e inheritance "ab initio"

2 Bl. 181 -

Perkins is best of all authors -

3^o Unity of Time - yr estate must begin at one and y same time - as if an undivided part of an Estate is devised to A, to take effect at one time - and another to B, to take effect at another they are not Jointenants - Coke 133. 2. Pl 181.

So if a remainder is limited to y heirs of A at 10, and a reversion to B at 20 different times (as it is morally certain they will) yr respective heirs are tenants in Common - Co Litt 188. 2 Pl 281-181.

2 Mod. 129. 13. C. 55. Litt sec. 283.

But it seems, yt 2 may hold an use as Jointenants, tho' it vests at different times - as feoffmt to A, to y use of himself and his future wife - For y use growing out of y feoffmt, has relation to it -

thus both are deemed to begin at y same time - 1. Co. 101-13. 2d. 66.

2 Pl. 181. 2-

4th Unity of Possession - They are seized per "my et per tout" - Each is seized of an undivided half of y whole, and not y whole of an undivided half - 2 Pl. 182. Litt sec. 288. 5 Co. 10. 2 Mod. 130.

Eng^o can't in strictness enfeoff y other, for each is already seized of every part) tho' he may release to him, and a feoffmt in form will not ensure as a release - Cro. Jacmes. 696. Perkins ⁱⁿ dec. 193. 97. Vent 78.

sec. 1. 93-97-

But if a fee is granted to husband and wife, they are not strictly Jointenants, nor Tenants in Common. Being conside^d as one, they are seized per feum et per tout only, and take by entireties and not by moieties. 2 Pl. 182.

Hence y husband can't by his own sole act, dispose of any part of it - not of a moiety - nor can y wife. But y whole must remain to y survivor - or disposed of by force and recovery, in wh both join -

T Coke 40- 2 Pl. 182.

Co Litt 187. 32. Pl. Litt Sec 2. 91. 6. 65-

5 T B 654-

For each is seized of y whole only, and not of any undivided part -

So yt neither of you alone, can be said to hold any part - nor dispose of any part without disposing of y others interest -

The last Rule don't hold as to chores in action, and chattels real

wh are vested jointly in y husband and wife, as a bond-note, or term for yrs bequeathed to ym both -

Of ^{these} ~~yo~~ he may dispose at pleasure during coverture and for valuable consideration - For yo he might do, if they had accrued in her sole right - of course he may do it, when they vest in both jointly -

Co Litt 351. Strong 516. 3 Wils 65. 3 PR 94.

Personal chattels given to husband and wife in possession - vest absolutely in him - Co Modes. 128.

Note - a wife is not entitled to dower in an inheritance holden jointly by y husband and another - The other tenant has a higher title -

Litt sec. 45.

Quere is husband & "contra" entitled to curtesy - 2 Modes. 128 -

What is y difference - Co Litt 30. a - 3 Bac. 188,

But accrescendi don't prevail in America

Upon y intimate union of interest and possession, depend y principal incidents of jointenancy - One wh is yt acts by one or to one - are regularly operative as to both -

If both make a verbal lease, reserving rent for one only - it will enure to both - by reason of y joint reversion -

So if yr Lessee surrender to one - it enures to both by reason of yr privity of Estate -

Indess acts done to, or for or generally by one in relation to y joint estate - are in legal contemplation, done to, or for, or by both - 2 Modes 130. 2 Bl. 182. Co Litt. 214. 192 -

Livery of Seisin to one is in legal effect, made to both - for y possession of one in law is y possession of both -

So entry by one is effectual for both -

Carthay 329. So in actions relating to yr joint estate, they must, according to y old Rule - sue and be sued jointly - Co Litt 180. B. 195. 2 Bl. 182. 2 Bac. 215. 11.

12. East 57. 61. Secus in Conant, and according, and according to late opinions, y Rule is relaxed in Eng - and now they may join or sever in actions, relating to yr joint estate - 1. Com. Re. 354. One can't have trespass vs y other, in respect of y joint Estate - 4th Ed.

183

For each has a right to enter on every part - 3 Leon 262. 2 Bl 183 -

But regularly one can't do any act, w^h will defeat Estate of others - as he can't release y^e whole or y^e others - consent, It w^o enable one to defeat y^e interest of y^e other - 2 Bl. 183. 1. Leon. 234 -

One may have an action of waste vs y^e other by construction of It of Westminster - 2. 2 Bl. 183 -

Secus at C.L. y^e act being deemed y^e act of both - and for both -

One may make y^e other bailif of his moiety, and so have account vs him for y^e profits - but ~~not~~ secus by y^e C. Law -

But by St. 4th Ames - one may of common right - have account 2 Mod 130. vs y^e other for receiving more yn his share of y^e profits - tho' not 2 Bl 183. Co & made bailif - Co Litt 161 -

Upon y^e intimate union of interest and possession, depends also y^e Grant incident viz - y^e of Survivorship -

The Right of Survivorship - ius accrescendi - is y^e right of survivor among Jointenants i.e. y^e whole remaining interest in y^e Joint tenancy after y^e death of his companions - So if A. B. C. are jointly seized - and A. dies - y^e others hold y^e whole by survivorship - 2 Bl. 183. Litt. Sec. 280. 81 -

For y^e original interest of all is y^e same i.e. an interest in all and every part - and y^e Survivor is not divested of his original interest by y^e death of his companion - He has then a higher claim to y^e whole, yn^{an} other has to any part - 2 Bl. 184 -

For y^e succession of another to y^e interest of y^e dec^d tenant, w^o destroy y^e survivor's original seisin "per my et her Tour". No other can hold as Jointenant with him -

This right of survivorship is paramount to y^e claims of y^e creditors of y^e dec^d tenant, even of Judgmt creditors - ni Execution be sued out at his death - The survivor's right of reversion is necessarily prior to theirs and of course paramount - Litt. Sec. 286. Co Litt 184 B -

3 Bac. 209. 10 -

Same Rule holds generally as to chattels personal holden yn jointenancy - 299. 302. 3 Secus as to Joint Stock in Trade - As to y^e, there is no survivorship - 294. 140. It w^o injure commerce and y^e Law Merchant governs - and to y^e Law. Mats 49. 146 y^e ius accrescendi is a stranger to it - Litt 281. Co Litt 182. 2 Mod. 125 Mats 140.

Strictly, these Partners in trade are not therefore Jt Tenants do all purposes -
 can be no Jt Tenancy tho' called such - 1. Ves. 242. 252. Cow 449. 5th 14 2 Mod. 185 -
 that y Jt accenscendi -

and for y encouragement of husbandry - y Same Rule as to stock on
 a farm, owned and occupied jointly - There is no survivorship -
 y is allowed by C Law - 2 Ab. 399. Co Litt 182. l. 1. Bern. 217.

Neither Jt Tenancy or any corporation can be Jt Tenants with a Private Person -
 Co Litt 140 - 2 Lear. 12 - The Reason, says Bl - is, y a private person has no chance of y survivorship &
 mutual - and y Jt accenscendi ought to be equal - mutual 2 Ab. 184 -
 But simple - y reason is not y - For 2 corporations can't be Jt Tenants
 tho' y chance of survivorship be equal. an Sole or aggregate -
 Litt 296. 2 Mod. 126

Besides tis not necessary, y y chance of survivorship shd be equal - or
 mutual - For A and B may be Jt Tenants for y life of A - Here B
 has no possible chance of survivorship, tho' A has - Co Litt 181. a-b -
 2 Mod. 126 -

10. Co 30 - 3. Mod 15 - Does not y reason, y y right of holding an Estate jointly with another -
 4. Bac. 642 - is foreign to y object for wh bodies politic are created - Tis not necessary,
 3. Co 594 - 4. 20 - for y exercise of their ^{express} powers - and they have no incidental rights, ni such
 810-22 - as are necessary to yr existence or at least yr benefit - peculiar -
 The rights of survivorship don't exist in Count - 1. Post 48 -

Jointenancy may be destroyed by destroying any of its unities -
 Tempus. irrevocable
 prateritum - Unity of Time it being ^{past} can't be destroyed - 2 Ab. 185 -
 Second by destroying its unity of possession - as if they part y land
 and hold in Severalty. They are not then seized "per tout" and y
 Jt accenscendi is destroyed - Co. Litt 188-193 - 2 Ab. 185 -

One tenant. loses
 his right of possession - By y C L one cd not compel y other to make partition, tho' they
 y unity is gone - might do it by agreement - Being originally created by agreement of all, it cd
 Jt accenscendi
 in fact only - and
 not in law
 not
 Jt accenscendi
 not

But by Jo 31. 32. Hen 8th either may compel a division by a
 writ of partition - Litt Sec. 2. 90. 2. 92. 2 Ab. 185 -

Third - By destroying its unity of title - as one alien or conveys his

his part to a stranger - here y other and y Grantee hold by diff titles -
the unity of possession remains -

2 Mod. 130 - 2 Bl 185

Of course they hold as Tenants in Common - Litt Sec 2, 292 Salk 286 - 5 Mod. 44 -

But a devise by one JT Tenant don't sever y Estate, for it don't
take effect - The Survivor has a preferable title accruing at y creation of
y Estate -

2 Bl 186 - Co Litt 185 - Litt Sec. 2. 87 -

4th By destroying y unity of Interest - Thus if there are 2 joint tenants
for life, and y inheritance is purchased by, or descends to one of ym - its
is Severed - His life Estate being merged - Merger is caused by some supervenient
cause -

2

Secus if an Estate is originally granted to 2 - for life and y heirs
of one of ym - For these being created by one and y same conveyance, are
not separate Estates - but branches of one Estate - and ergo not merged

2 Co 60 - Co Litt 182 - 2 Bl 186 -

If a Tenant for life make a lease for life of his share, it destroys
y Pointure - It's a Severance of y Freehold - 2 Bl 186 -

If one of 3 Joint tenants alien his share - y 2 others hold yr parts as
before - as to ym there is no severance - So if one of y 3 release his
part to one of y other 2 - The Pointure as to y other 2 parts remains -
So y^t a Rellesse holds y whole of an undivided third, as in Common -
and is a Jointenant with his companions as to y 2 others, 3rd not as
to y other 3rd -

Litt sec. 2. 294-304 2 Bl 186 -

Whenever y Pointure ceases, y "jus accrescendi" ceases with it -

¶

Co Litt 188 - 2 Bl 186

In general tis advantageous to dissolve y Pointure - for y jus accrescendi
being taken away - each may transmit his part to his representatives

Secus if 2 are Joint tenants for life - Co Litt 188 - 2 Bl 186 -

287 - 2 Bl 187 -

If 2 are joint tenants for life, and one of ym alien for y life
y other - he forfeits his interest - The first by y severance, he has in
his own half - only an Estate for his own life - and his grant of it
for y life of another, is a forfeiture -

2 Bl 187 - Co Litt 252 -

2 Bl 187 -

but he don't remove If one of 2 jointtenants evicts y other, y latter may have ejectment - his def from possessor obtain possession - But there must be an actual ouster - Sole if he recover but possession and y receipt of y whole profits by one, is not satis - to he takes possession give y action - ouster is an absolute turning out, or what is equivalent - jointly -

3 Bac-219- Co Litt 149-200 -

For these alone do not amount to an ouster, and where there is no ouster, y possession of one is y possession of both and y receipt of y profits by one is considered to be for both -

So one may have an action of waste vs his cotenant by construction St-Medlin 2^d but not by Co Law. - 2 Bb. 188+

For as by y Co L. there cd be no compulsory ~~for~~ partition - y inheritance cd not seem be protected by y waste or wrongful acts of either -

Estates in Coparcenary.

An Estate in coparcenary is one - wh has descended to 2 or more persons - as when at Co L. y next heirs of a de^d person are 2. or more females - Here they all inherit as Co heirs - and are called Coparceners or parceners -

So by y custom of Gavelkind all y sons are coparceners

Litt Sec. 265.

2 Mod. 113. 22.

Co Litt 165.

In Count all y children of a person de^d are his heirs - at Law and inherit as Coparceners - 2 Bb. 187 - Litt Sec. 2. 41-42

All y ~~heirs~~ ^{parceners} are consid^d as but one heir, they having but one and y same estate - 2 Bb 187. 2 Mod 113-117-18-

The properties are in some respects, like those of Jointtenancy -

3 Essential Unities viz of Interest - Title - possession -

2 Bb 188-

and as I conceive They may sue and be sued jointly in cases relating to yr estate they must sue jointly and y Entry of one is in general y Entry of all - 2 Bb. 188- and Co Litt 165.

Late opinions say they may sue and be sued severally -

So Entry of y Guardian of one parcener enures to y others -

7. TAo 386- 2 Bb. 188- 209- 228- Co Litt 242 B.

One can't have trespass vs y other, nor can one, like Jointtenant - maintain an action of Waste vs y other - for one parcener cd

137

always prevent waste, by compelling partition, wh till St 31-32.
Hen 8th - Coparcenary - do not do - Co Litt 174 a b. 2 Mod. 119-120.
2 RB 185-86-

They differ materially from St Tenants in other points -
First they always claim by descent - St Tenants by purchase -
Hence no other but States of Inheritance can be holden in Coparcenary -

and in general whatever may be holden may be so holden -

Litt Sec. 254 Co Litt 164 - B. 164 - a.

Second - no unity of time is necessary, as if one of 2 parceners dies -
y survivor and y heirs of y de^d are still Parceners - tho y^r estates
vest at different times Co Litt 164 - Co Litt 174 - 2 Mod 114-115 - 2 RB 188-

Third, tho they have a unity, they have no entirety of Interest -
Each (there being 2) is seized of a distinct undivided moiety, not 2 RB. 188 -
of a moiety of y whole - Hence no jus accrescendi, y share of each descends Co Litt 163. 4
to y heir or heirs - Co Litt 174 - 164 - 2 Mod 114-115 - 2 RB. 188 - 164.

The mod^e of descent is "per capita" if y claimants are interested or related
in equal degree, and are entitled to y^r own right - As y ancestor leaves
2 daughters or sisters - each takes a moiety - Co Litt 164. a b. 2 Mod. 114-115 -

Secus if they are not in equal degree related, or entitled by
right of representation - they then take "per stirpes" as y ancestor
has 2 daughters, one of whom dies leaving ~~the~~ Issue - 2 daughters -
living y ancestor - The Issue takes "per stirpes" - i.e. y share, their
mother, if alive, wd have taken - So if y heirs are all grandchildren -
y Issue 2 daughters - The issue of each, whether one or many, will
take her share - For tho' in equal degree, they are entitled by right
of representation -

In descents from Coparceners, males are at C Law. preferred to
females - as in other cases of descent -

As long as y land continues in a course of descent (y possession not
being divided) it is held in Coparcenary - Secus if y possession is
severed by partition - So if one alien his share, tho' no partition -

for y title is disunited & y descent broken - 3 Abb. 188-

Litt Sec. 309- If one of 2 parceners alien his share to D. now y other and D. hold not as Parceners, but as Tenants in Common. - So if one disseises y other, y Coparcenary is at an end, for y possession is severed. - There is y Tenancy any more destroyed, y n in y case of Joint Tenancy take yd, not to be law.

So if 2 Parceners marry and die leaving husbands entitled to courtesy - y husbands don't hold as Parceners - but as Tenants in Common. - For they do not claim by descent -

Co Litt 167. s. 2 Mod. 118-

As a husband may have Curtesy in an Estate holden by wife in Coparcenary - So y wife may have dower (terre) in lands so holden by y husband - There is no survivorship -

2 Mod. 118- Litt Sec 264-

Partition may be made among Parceners - by ^{consent} descent in 4. different ways - - by ~~consent~~

2 Abb 189- First - Where they agree as to y division, and y part each shall have -
2 Mod 120 Second - Where they chose a 3^d person to make y division -
Litt sec. 243 264- Third - Where y eldest divide and y youngest choose first -
3 Co 22- Fourth - Where they cast lots for y shares -

2 Abb 189- They are also compellable to make partition at Law -
241-

Compulsory partition is by writ of partition at Law - or by bill in Chy - Litt Sec. 244- 2 Abb. 189- 2 Mod. 120- 1. Poulb. 15-18-
Litt 169- s. n. 2 171-

On a writ of partition there are 2 judgments - The former is y^t a partition be made on wh a writ issues to y Sheriff - to cause partition to be made by Jury - On y Return of y Jury's inquisition or verdict - y second judgment is given viz - y^t y partition so made, be satisfied, and forever confirmed - 2 Mod 120. 21- and y judgment binds infants - as well as adults -

Co Litt 169- 3. n. 2. 1. Poulb. 16-

The common practice formerly was to apply to Chy to make partition - and it is now y practice where y title is complicated and there is any incumbrance - 2 Mod 120. 1. Poulb 115-19- Co Litt 169- n. 2. 3-
Where an Indivisible thing is holden in Coparcenary, y common practice

is for y eldest sister, or tenant to have it (if she please) making y others
a reasonable compensation in other parts of y inheritance, or they all have
y profits or use of it by turns - As a Mill - 2 Mod.

Co Litt 164. 5. 2. Bl. 190.

Estates in Common - May 4

Tenants in Common - as Bl says, are those who hold by several
and distinct titles - but by unity of possession, undivided possession -

2 Bl. 191.

yo is incorrect -

By yo must be understood - yt no other unity, but yt of possession is necessary
to constitute a tenancy in Common. For they may hold y same quantity
of interest, vesting at y same time, and under y same title or conveyance -
if y proper terms are used to create a Tenancy in Common -

But if y interest and y title are y same, and do commence at y
same time and y possession is united - y Estate is "prima facie" a
Jt Tenancy - 18. y owners will be Jt Tenants, ni there are apt
words to create a Tenancy in Common. In Jt Tenancy, y possession is
per my - and not per tota -

134.
3 Bae. 188-194 -

2 Bl. 191 -

2 Mod. 133. 4 -
Co Litt 189. a

And if there is no other unity ym yt of possession, they are of course
tenants in Common.

Coke defines Tenants in Common - those who hold lands by several
titles - I by several rights - distinct rights - and interests - and not by
Joint rights -

Co Litt 189. a. 2 Mod. 133 - 3 Bae. 188. 194 -

Hence one may hold in fee and y other in Tail - or for life -
for there is no unity of interest - One by purchase from A. another
from B. or one by purchase - y other by descent - For unity of
title is not necessary - The Estate of one may vest at 1 time, yt
of y other - at another - For unity of time is unnecessary -

2 Mod. 134

The only necessary unity is yt of possession, so yt neither can
know what part is his - yo is correct -

Tenancy in Common may be created either by such a destruction
of an Estate into Jt tenancy or Coparcenary, as does not sever y
sever.

y possession or by special limitation, in a deed or a devise -

as 1. of 2 *It* tenants, claims his part to *It* *It*, and y other *It* Tenant are Tenants in Common, for they have several titles commencing at different times -

So if one alien to A, y other to B, y Grantees are tenants in Common for y same reason -

3 Bac 194.
2 Pl. 192. - So if one of 2 parcenars conveys his part to *It* - he and y other parcenars are Tenants in Common - *Causa Qua Supra* - Litt sec. 309.

So if an Estate is granted to 2 men or 2 women and y heirs of yr bodies, tho' for life they are *It* tenants - Yet they have distinct inheritances - But as y possession is undivided, yr issues shall be Tenants in Common - Litt sec 283. 2 Pl. 192 -

For yr titles are different. One holds as heir of A and y other of B. Indeed whenever *It* Tenancy - or Coparcenary is destroyed with a partition - so y unity of possession remains, tis converted into a tenancy in Common. 2 Pl. 193. 3 Bac. 194.

at 3 Pl. 194.
is favoured in construction -

Second - *It* may be created by express limitation in a deed or devise -

But care is necessary not to use words creating *It* Tenancy -

And if by deed or devise there is given or granted to 2 or more an Estate wh is not a *It* tenancy, it must be *It* Tenancy in Common - *It* can't be a coparcenary being created by purchase - 2 Pl. 193 -

The Rules of construction favour *It* tenants, rather y tenants in Common. For by y latter y feudal services arising from tenure as decided -

2 Pl. 193. 2 Hides 134. 3 Bac. 194 - 5

The most usual and safest way where a tenancy in Common is to be created - by deed or devise - is to limit y Estate to A and B expressly - to hold as Tenants in Common and not as *It* Tenants -

2 Hides 134

2 Pl. 193. 4. 3 Bac. 195 -

But other modes of expression will answer y purpose as well -

As a Grant of land to A and B - to be one half - to A, and y other half to B - for *It* Tenants don't take by distinct moieties - and here a severalty of Interest is clearly expressed - Litt sec 298 - Co Litt 190 - a - 2 Pl. 190 - 3 - 3 Bac. 194 -

So if one grants an undivided half of his land to *PG* he and *PG* are tenants in Common - for they have different titles accruing at different times - Litt 299. Co Litt 140. 3 Bac. 194.

A Deed or devise of Land to 2. to hold jointly and severally, creates a *Joint Tenancy* - for a joint estate is implied in it and jointly and severally imports perhaps only a power of partition -

Doham 52. 2 Blk 183.

But an Estate devised to 2 or more to be equally divided between you - is an Estate in Common - For y intent is plain, y^t they are to hold by moieties only - as to A and B equally - 3 Co. 39. 2 Blk 193. Cow 657. 2 Blk 193. 1. Eq Co 292. 2 Ves. 252. 1. Vent 32. Co Eliz 695. 2 Blk 193.

But it has been often holden, y^t these words, in both y above cases in a deed creates a *Joint Tenancy* 2 Blk. 193. 1. Eq. Co. 291.

3 Bac. 195. Comyns Re. 88. 3 Bay 622, 1. P. M. 17. Salk 391.

However in a modern case, such words in a deed. have been held to create a *Joint Tenancy* in Common and I presume correct - 1. Wils 341. Cow 650. 2 Mod 135.

Tenancy in Common may subsist in Estates of Freehold - Chattels Real - & Chattels Personal - 2 Mod. 135. Litt sec. 320.

Wife of a tenant in Common (if an inheritance) is entitled to Dower, as it seems y husband to courtesy, where y wife is Tenant in Common - Litt Sec 44. 5. 2 Mod. 135.

There being no "jus accrescendi"

As Tenants in Common have distinct rights or interests, one may directly convey his share to y other. wh^{ch} a Tenant can't do tho' they may release - 2 Mod. 135. 6.

As to its Incidents Tenants in Common are not compellable by Law. to make partition, tho' by St Hen 8. 31. 32. they are - 2 Blk 194. 2 Mod. 136.

By Law. consent of all is necessary as in *Joint Tenancy* -

There is no survivorship between you. for they take distinct moieties. 18. in point of Interest - 2 Blk. 194.

They can't according to former opinions, join in actions relating

2 H Bl 387-

422-

to 422-
Ed

Salk 390- 2 Bl 194-

Litt Sec 311. Co Litt 197. a.

But ont y^s Rule exploded - 12. East 57. 6/- 2 Cases 169- 1. Cont. B 354.
 Yet if an indivisible thing (as a horse ^{holden in Common} is to be sued for) all ought
 to join -

The right of action in y^s case survives to y survivor - So in Trespas-
 and all other personal actions) founded on y^r interest in Common,
 they ought to join - For tho' y^r estates are several, y damages to be
 recovered, are not so. Besides, t^ho' be impolitic to admit several
 actions for y same Trespas. - Litt Sec. 315. 2 East 154-
 Co Litt 198- a - Esp Dig 404- 2 H Bl. 3.

Indeed these actions survives to y survivor, wh furnishes an additional
 reason for y joinder of all - Is not y^s y principle of y Rule -

Co Litt 197. B. 2 Bl. 194- 3 Bac. 216-

If they make a lease rendering, reserving rent, y reservation will
 follow y reversion - or y nature of y reversion wh is several -

Ergo they can't joint in an avowry for rent arrear - y^r title
 to it being several - Sed Quere may they not join under y
 Mod Rule? 3 Bac. 216 vide ante - Co Litt 197. B. 2 H Bl 387-

2 Wils 232

2 H Bl. 387-

Cro Cases 966-

Esp D. 448-9-

Co Litt 200-

3 Bac. 216-

Ed

Lo Ray 312- 341-

Earl 224-

Cumberl. 219

Foran 820

If they are disseised, they can't it is said, join in an action
 to recover y^r land - For y^r titles are distinct. 2 vent 214-
 Such at any Rate has been y Rule heretofore

Indeed for y same reason. they can't make a joint demise to
 found an an ejectmt. Hence y Lessee in such cases, can't
 recover.

Secus of Coparceners. as well as Jt Tenants - Their titles and
 interests are y same -

Quere as to these distinctions, for according to some late authorities
 Jt Tenants - Coparceners - and Tenants in Common may either
 join or sever. (as they chose) in ejectmt.

At C Law. one can't sue his companion in account for recovering
 more yⁿ his share of y profits of y Estate - as where y latter is made

baileif to y former, as in y Case of St Tenancy -
 altered by St -

But by St 4.th Ann - y action lies between ym, as these tenancy
 in Common - So by St Westminster 2^d One may have an action of
 Waste vs another - 2 Bl 183. 194 -

If one tenant in Common disseise, or evict y other, y latter may
 have ejectmt - to regain possession - Co Litt 199. B- 200. a -
 2 Bl. 194 - 1 East 568 - 3 Wils 118 -

Same Rule as to St Tenants -

But there must be an actual ouster, & each y possession of one
 is y possession of both - Same in St Tenants, Hobart 120. Talk 392 -
 1 East 568 - 7 Mod 39 - For 53 - 960 - 1180 -

Sole possession by one or receipt of all y profits are not satis -

As to what amts to satis Evi of actual ouster, There cant be Cow. 217 -
 an actual forcible ouster proved, for tho' sole possession by one as
 Tenant in Count. can never amt to Evi - of actual ouster,
 yet a sole and adverse possession by one is satis - As possession
 by one who denies y others title -

Here y Jury may presume actual ouster -

So great length of sole and quiet possession (as 36. yrs)
 by one (no account being demanded by y other) is satis Evi 12. mod. 658.
 to a Jury, y^t y possession is adverse and in such cases, St & Ray 812 -
 of limitations may run between ym - Cow 217. 3 Burr 1894 -

But confession by St in ejectmt or lease Entry, and ouster under
 y Common Rule is satis, to prevent a warrant - To y^t y case may
 go to y Jury - Bull Nisi 109. and is satis as to y point of ouster -
 3 Bac 219. C^o J. 451 -

After such recovery in ejectmt, y tenant disseised may have trespass
 for y Mesne profits - for this is incident to y recovery - and is virtually

only an account action of ~~action~~ account

The St of Limitations don't run vs a tenant in Common out of possession, where his companion is in possession as in case of Actual Ouster at Ante. If there is no Ouster, y possessor is not adverse & ergo y't possessor of both

How far y Tenant out of Possession may elect to consider himself ousted or not See Burr. 111. 117

The Judicial Remedies between Tenants in Common extend only to tenancies in Common, in things Real or Savouring of y Realty. as Estate in Land—

^o Sir fec. 322.3 If a Chattels Personal is owned in Common, and one takes sole possession, y others only remedy is by reseizing it when he can — There is no action — or reclaiming it

Co. Lit. 200.
3 Bac. 219.

Ita St Tenant—

Tenancies in Common — may be destroyed —

First — By Partition —

Second. By uniting all y title and interest in one
2 Bl. 194 — Tenant by purchase or otherwise — Is then
an Estate or Estates in Severalty

Of one of 2 St Tenants, Coparceners — or Tenants in Common who are disseised — is under a disability — does y St of Limitations run vs y other ??

Finis

Title by Deed - Requisites. 1st

152. Who may be Grantees 156.

2^d Consideration 157. 3^d 161.4th 162. 5th 170. 6th 171. 7th 173.Attestation 182. How may a deed
be avoided 184. Construction 187.1st Requisite - Parties able to contract and
subject matter to be contracted about. 1522^d Requisite. Consideration 157. 3^d 161

be written on paper or parchment 161

4th Requisite. Subject matter to be legally and
properly set forth 162. See 8 formalparts of a deed. 162. 5th Requisite
reading the deed before Execution 170.6th Sealing 171. 7th Delivery 173.

Clergy 175. Attestation 182. How may

a deed be avoided 184. Construction
187. Who may be Grantee, 156.

Modes of acquiring Real Property -

47

Hitherto we have treated of the nature of things real, the tenures by wh they may be holden - and the several kinds of estates, or interest, yt may be had in ym, We are now to consider the manner of acquiring and losing the Title to things real. And y title to things Real, is y means, whereby the owner of lands hath y just possession of his property -

The first mode of acquiring property of wh I shall treat, is Purchase, wh includes every mode of acquiring an Estate except by descent, tho' it is sometimes used in a more limited sense - thus an Estate acquired by forfeiture, by Escheat - by occupancy - by prescription & by alienation - is said to be acquired by purchase - I shall treat only of alienation ~~for~~ ~~see~~ for others vide Pl. 2 vol 241. 58. 263. 67.

Alienation comprehends every mode of transmitting Real Property from one to another, by mutual agreement - 'tis the most usual mode of acquiring a Title to Real Estate - ~~to do it by purchase,~~ and is equivalent to y meaning of the word purchase in its limited sense - 2 Pl. 241-44-67-87.

During the early period of y feudal government, a tenant cd not alien or incumber his Estate wtht y consent of his lord and his own heir apparent, Co Litt 94. 2. Pl. 57. 287. 8. Nor cd the Lord alien his Seignory wtht y consent of the tenant at Will, wh consent was called Assent to the Alien of y Lord.

This restraint of alienation was then mutual, and in y Reign of William y Conqueror and his sons, the lands were absolutely unalienable 4. Cruise 34 - and even some time after y right of alienation was introduced, y highest Estate yt cd be granted was for y life of y Grantee.

These restrictions however, have been gradually abolished, the first St. m. made y greatest inroads on y restriction of alienation, was yt of "Quia Emptores" 18 Edw. 1. & then St. first of Edward 5th. Still y right of alienation was transmitted with fines till y 12th Ch. 2^d who abolished fines for alienation of freehold Estates, as also y Military Tenures and converted ym into socage - This last is abolished all y restraint on alienation, ne yt arising from attainder 4. Cruise 47. 2. Pl. 77-9-299. and at length y necessity of attornment in St 4th 5- Anne 2 Pl. 290. This is a very general account of y progress of alienation - or y right of alienation -

The legal evidences of y Alienation of Real property, are called in law "common assurances" quia tis by these yt every man's Estate is assured to him - These assurances are of 4 kinds - First Deeds, or as they are called matters in Pais, as distinguished from matters of record -

2^d Matters of Record or Judicial assurances transacted only in y King's Ct of Record

3 Assurances founded on Special Custom, of wh our law has nothing to do, for we have no local customs -

Fourth - Devises wh are not Co Law. assurances, but were introduced by St. of the Second and Third, I say nothing, as these modes are extremely rare, both in y country and in England, 4 Cruise 49. 2 Pl. 294.

Alienation by Deed.

A deed is a writing sealed and delivered, writing and sealing constitute y instrument, but wtht delivering, it can't take effect - and ergo delivery is the essence of a deed - Co Litt 171. 2 Pl. 295. Co Litt 35. B. 4 Cruise 10.

In. R. of
y writing
signed -
sealed -
delivered
acknowledged
and Recorded

It seems doubtful, an in y law of Court, sealing is necessary to a deed, for our St. prescribes writing - signing - delivery - acknowledgement, and recording as requisites, for a deed, and says nothing about Sealing -

The making a deed, is y most solemn disposition, wh a man can make of his property, hence it is said, yt a man shall be estopped by his own deed. 2 Bl. 295. Bac. Abr. Leases. Co Litt 47. a J B. 227. a The meaning of y maxim is, yt no one man be allowed to aver or prove any thing in contradiction to his deed, wh he acknowledges to be his own. 2 Bl 308.

and hence if A makes a lease to B of land, in wh a has no interest whatever, and a post gains y title, it will enure to B. for a is not allowed to deny y Covenants in y deed, by wh he has allowed, yt he owned y land.

The fact then, yt a had no interest in y land at y time of making y conveyance, yet as a is estopped by his deed, it in y way amts to y same thing as if he had. 1. Falk. 296. 3 T R. 438. 441. 371. Pow Con. 160. 2 T R 171. Corp 570. Pow M. 495. B. Ld Ray 729. 1048. 1552. Co Litt 47. a J B. Esp Dig 233.

In y State however, it has been decided yt a total fraud in y consideration of a deed, might be alleged to defeat it, but y is professedly a departure from the principles of C Law - whose remedy wd be an action on y Covenants in y deed 3 Bay 329.

But tho at C Law, a person might not aver a fraud in y consideration, yet a man might at C Law. aver a fraud in y execution - for such an avermt amts to a plea of "non est factum." In a deed of conveyance or lease, the Estoppel is created by y Covenants expressly or implied.

Words of y kind - *Dedi et Concessi*, imply a Covenant yt y Grantor has a right to convey - But a deed of "Quit Claim" is no Estoppel i.e. y Party making it, may deny yt he had any title at y time of making it, & he may post purchase y land and hold vs y Releasee in y Quit Claim deed - if he had no interest in y ~~land~~ land at y time of making y deed. for y Quit Claim deed contains neither expressly nor impliedly any covenant, yt y Releasee has any title to.

to y land, at y time of making of y Quit Claim deed, or release as it is called in Eng- Co Litt 265. Litt Sec. 446- 3 J R. 370-

Any bond or covenant is as much an Estoppel as a deed of conveyance, thus y obligor in a bond, can't deny y't there was a consideration, which he has acknowledged in his bond-

A deed executed by one of y contracting parties only, is called a 'Deed Poll' If executed by all of y parties to a contract, it's called a 'deed indented' Litt Sec. 370. 1. 2. 2 Rb. 295. 6- Co Litt 220- 4 Cruise. 11. 12.

Where each part of an indenture is executed by one of y Parties only & delivered to y other, y different parts are said to be interchangeably executed and in y case, y part executed by y Grantor is called y original; y't by y Grantee, y counterpart- But where every part is executed by all y parties, y several parts are called originals- 2 Rb. 296- 4. Cruise 12-

This distinction has a material effect in y law of Evi, for where y deed is interchangeably executed, y original part is y better Evi- Prec Chy 116- 5 J R. 465-

Requisites of a deed-

First - There must be Parties able to contract, for y purpose intended, and a subject matter to be contracted about, 2 Rb. 296- Co Litt 35- 4 Cruise 14. 30-

If y whole interest in any subject is to be granted, all those who have any interest, shd be parties to y deed, So as a part only will be conveyed - all those intending to ~~convey~~ take any immediate interest under a deed, shd be parties to it- But a remainder man need not be a party, tho' he must be mentioned - The reason is, y investiture of y particular Tenant injures to y remainderman - both interest- being created by y same, deed or act- Co Litt. 231. a- 4. Cruise 14. 4. 26-

All persons under no legal disability, may convey by deed -
 2 Bb. 290- 4. Cruise 14 - This disability contemplates only
 y disability of persons, but there may be something like y
 disability of Estates to be conveyed, thus a person disseised, tho'
 y rightful owner of y estate, may not convey it, while out of
 possession to any other person yⁿ him who is in possession, and
 for y same reason yt chases in action may not be conveyed -
 viz yt it encourages maintenance - 1. Will 481- 214.390 -
 Touch 39. Eliz Cro- 447- 2 Bb 291-

In Court, there is a Penal St prohibiting y Sale of Lands
 under these circumstances, the conveyance is not only declared
 void, but it subjects y Grantee to a penalty, amounting to
 half the value of y land - 1. Root 104 99 402-

But a conveyance of y disseised owner of y land to y disseisor
 is not within y Court Law, or within our St, for y^s is not
 selling a lawsuit and dont encourage maintenance -

But y owner of land is not prevented from conveying his interest
 by the possession of another, viz y possession is adverse, for such
 conveyance does not contribute to maintenance - and hence y
 owner of a Vested Remainder, reversion may sell his interest
 tho' y particular tenant is in possession, it not being adverse -
 2 Bb. 290-

And whenever another is in y possession of land but claiming
 under y owner, which is a Tacit acknowledgmt of his title,
 y owner may convey all his interest in y lands to a 3^d person
 on admitting his right -

But it has been holden in y State, y^t y same making void
 sales made by y disseisor of lands in a 3^d person dont extend
 to Sales made by y true - 1. Root 483- Kirby 221-

Nor does it extend to Sales made by administrators, and under
 y order of a Ct of Probate - for paymt of debt, for y^s is

Sale, being made by order of Law -
substantially a Judicial Sale - 1. Root 489. 1. Root 100 - Contract
not law -

An agent of y law also, is not within y letter of y Rule -
but y former is y better reason - 1. Root 491 -

So also a Sale by y Guardian of an infant, land by order
of Ct or legislature is not within y Rule - 1 Root 491 -

^{ya}
As Rule above A collection of taxes or a person devisee of lands, may sell
extends to private those lands to raise y amt of y Tax, for y is by order
Sales - Sales of Law, and not within y mischief of y Rule - 1. Root 491 -

If a Mee being in y possession of land denies y Mors title
and holds adversely, y don't prevent Mor from selling
his equity of Redemption for if this were y case, y Mor
might by y Mee's acts, be forever prevented from disposing
of his Equity of redemption - And the Mee goes into y possession
facilly admitting y right of y Mor and y Mor can't in y light
person, person Further y Mor can't in y case bring quietment vs
y Mee 2 Root 499 -

With regard to conveyances by infants, vide Parent. and
Child - They are in general only voidable and y Rule is better
for y infant ym yt yy shd be absolutely void - 2 Pl. 291 -
4 Cruise 15. onward -

Idots and Lunatics are not in general competent to make
valid conveyances, but yy are only voidable, i.e. they may be
set aside by yr heirs - 2 Pl. 291 4 Cruise 20, Litt Sec 405 -
Co Litt 41- 247. 1. Hon. b. 41-D-2. (Contract vide)

^{no}
no person can If an Idiot or Lunatic leaves a fine or suffers a recovery of his
tutify himself land, it binds himself and his representatives, for neither he nor
such y manner they can contradict y Record 2 Pl. 291. 2 Pl. 1104 - Co Elvi - 398 -
of y C.L. but 4 Co 123 - 4 Cruise 20 -
his reprobates The general maxim of y C.L. is, yt a Lunatic or Idiot can't
may do it himself impeach his deed, i.e. can't tutify himself - but y
for him - doctrine is exploded in Court. Here y Guardian of an Idiot

2 Pl. 292. may impeach y Deeds deed, while he is living -

but an Deed may bind him

If a person non Compos purchases an Estate, he may when by suffering he recovers his understanding, either ratify or annul y contract, a recovery & if he does ratify it, it then becomes unavoidable -

for record cant be contradicted

If he dies witht recovering his understanding, or having recovered it, if he dies witht ratifying y contract - his heir may avoid it - 2 Pl. 292.

4 Co. 120

With regard to conveyances by Feme Covert - see Husband and Wife - they are in most cases absolutely void - 2 Pl. 292.3.

4. Cause 20. onward

If a deed is obtained from one by duress, he may on being released from duress, either ratify or avoid - So y^t such deed is merely voidable - The Rule is y Same where one purchases an Estate while under duress - 5 Co. 119 - 2 Pl. 292 -

If a deed is made by 2 persons, of whom one is capable, and y other is not, y deed will operate as the deed of y former only -

If one person having an interest in lands, joins with another person, in making a conveyance of y lands, who has no interest in ym, y^s deed as to passing y interest will enure as y sole deed of y former, But P. G. thinks as to y it will be binding on both - for y latter is in y character of a Surety -

On y other hand, if one only of 2 grantees, is capable of of taking under y deed, it will enure to him alone - as lands granted to P. S. and a Monk professed, who is deemed in Law similiter mortuus - 4 Cause 429 -

P. 66
4 Pl. 472 -
1. Pl. 514 -

If a who is a person legally capable of conveying, joins with a Feme Covert, making a conveyance, y deed is regarded as y sole deed of a, for y deed of a Feme Covert is absolutely void, and y deed may be pleaded as y sole deed of a -

Who May be Grantees?

By y C L all persons in general may take an interest under y deed of another - Thus Idots, Lunatic - Femme covert - & infants may take by deed, for it is presumed to be beneficial to ym, and in y^s y law dispensed with y assent, wh is generally necessary to make a contract valid - 4 Cruise 22. Co Litt 2. R. 3 a. 112 a -

But in these case yr purchases are voidable, 1st. a Femme Covert, may - if she survive her heirs; or y infant may on attaining his age, ratify or avoid y Estate purchased -

An alien may at C Law, also purchase an Estate by deed so y^t y land will pass from y Grantor; but he can't hold it vs y Crown after office found, 1st. y land passes from y Grantor and continues in y Grantee, 'till office found -

4 T R. 300 - Co Litt 2. R. Esp Dig 439 - 4 Cruise 22 -

An alien friend however may hold a lease for yrs of a house or building, for y encouragement of commerce, but he can't for y^s purpose hold real property, ni he is authorized so to do by special St, or licence from y Crown 2 R. 203 -

This Rule holds in y^s country, our St Law is, y^t an alien may not purchase lands - There is an exception in our St as to lands purchased by British subjects before y revolution

So also in favour of French Subjects acc^y to y treaty of Louis 16th Those who are naturalized under y laws of y U S are not within y^s Rule, for they as to most purposes have y same rights and privileges, as Natural born citizens -

In Kentucky, aliens may inherit real property, and in Penn Aliens may take by devise or descent, But in neither of these States can be take by deed, ni he is domiciled

Ed. Encyclopaedia article alien

By certain Eng Sts, alienations in Mortmain, are in some

cases prohibited & in others much restrained 19. an alienation
to any ecclesiastical or other corporation - or any corporation -
2 Bl. 256. on w. 1. 50 479-4 Cruise 23-

We have no such Sts with us. Ecclesiastical Corporations
and many others may hold lands, but banks, and Insurance
companies are in general prohibited in yr charters, to hold
lands in so far as is necessary for y^e erection of houses, and
what is necey to be taken to secure debts due to y^m -

We have a St providing, yt all lands granted for y^e support
of y^e Christian ministrie, of schools, and for charitable uses,
shall forever remain to those uses - But y^e St is frequently
evaded by long Leases -

II Consideration -

It is laid down in y^e Books, yt a deed must be founded in legal
and sufficient consideration - 2 Bl. 295. 4 Cruise 24-

use is an
interest
equitable
purely
Trust
supplies its
place now.

It seems however not to have been originally necessary at C^o Law
yt a consideration sh^d be expressed in a deed, as a deed was
supposed to imply an consideration Plow. 308. 4 Cruise 24-

The necessity of expressing a consideration arose out of y^e doctrine
of Uses For under y^e doctrine, tis said yt a deed expressing
no consideration was deemed to raise a resulting ~~trust~~ use
to y^e Grantor, in an Use was limited to some third person - now -

in use is an
interest is surely
equitable, but
expresses it, to

Therefore it became necessary to express a consideration in a deed
of conveyance 2 Bl. 330- 136. 271. 2. 327. Roberts & Convey. 55. 65-

Since what is called St of uses 27. For 8th has executed y^e use
i.e. transferred y^e use to y^e legal Estate, to y^e Certain Use Use, a 2. Bl. 296
deed expressing no consideration, transfers an use to y^e Grantor Perky Sec. 533
at Law - before it enured to his use at Equity only - 1 Mod. 263 -

Under y^e doctrine of Uses if an Estate, was limited to A. for y^e use
of B. y^e legal Estate was vested in A and y^e beneficial interest
in B. now since y^e St wh executed y^e use, y^e legal Estate as well

as y beneficial interest is vested in B, This It didn't have y effect intended, and Cts of Eng devised trust estates, not are precisely what uses formerly were -

It has been lately doubted an y Rule yt a deed expressing no consideration, creating a resulting use in y Grantor, applies to any other y a deed of bargain & Sale, as y deed was created by y St of Uses - P G - thinks y doubt very reasonable

327.38, 2 Pl. 296. n. 1. Hill - Pl. 351 - Rob T.C. 60. Hep Touch. 221. 1 Co 176. a. d. A consideration either good or valuable is satis to raise an use - or to support a deed of conveyance

And by y Eng Law - at y^s day, a deed declaring no use enures to y Grantor Cowp. 7.

Same phrasology used in y^s State -

It has also been a question in y^s State an a deed not expressing not expressing a consideration, shall enure to y Grantor under law - This quest has not been judicially contested - here y doctrine of uses has never prevailed -

The Necessity of consideration arose from y doctrine of uses - as to existing agreemts valuable consideration is necessary, but a good consideration is satis as a deed of conveyance, a

Consideration

3. Co 57. n.

83-

1 Fein 337

Valuable consideration is one of some pecuniary value - 4 Cris. 24.5. A Good consideration, is yt of kind ^{red} or natural affection - to near relations i.e. as those who stand in near relations to y Grantee - as Parent and Child - Brother and Sister - Nephew and Niece - heir at Law - & wife

No person who don't come within y^s description, i.e. more distantly related to y Grantee yn Nephew or Niece, is not heir at Law of y Grantor, is not a near relative - A conveyance ergo to y heir of my nephew, in consideration of kindred is void, ni yt person is my heir at Law -

E. then marriage is procuring cause when it is procuring cause to y marriage

Marriage is always deemed a valuable consideration - a Pointure 2 Pl. 297 - 4 Cris. 24 -

ergo settled on y wife before marriage will be good as to y prospective
Grantor and his creditors - but marriage is a ^{valuable} good consideration, only when properly done

But there is y material difference in effect between a conveyance
for a good and a valuable consideration - Both will make y
conveyance valid as to y Grantor and his heirs, but a
good consideration will not support a deed of conveyance
as to creditors of y Grantor - or as subsequent bona fide purchasers
for value under y Grantor - 2 Bl. 297 9 East 59-

The consideration expressed to have been received in a deed
can't be denied by y Grantor, or his representatives for y purpose
of defeating y title of y Grantee, even by an averment of
fraud - at Law - but he may at equity - 1. Pow. C. 348 - 2 Bl. 297 - 3

295- 7. Co. 40 - Flow. 434 - 1. Root 479-

464.

vide 3 V. Re. 438, wh at first view seems to contradict 2. Ch. 464.
y position, but y averment of fraud didn't contradict any thing
yt y deed imported on y part of y Self - but merely a
recital on y Plaintiff's part -

But y Grantor may impeach y consideration for any illegality
and y he is allowed to do more for y benefit of y public
yn for himself - but y don't show there was no consideration -
2 Bent 109. 2 Hills 344 - 2 Bl. C. 296-

Third persons as creditors of y Grantor and bona fide purchasers,
under him, may deny y existence of a consideration, for they are
not stopped by y Rule -

Given

A deed expressed to be for divers good considerations, or for good
and satis consideration, is regarded as expressing none at all,
for y Ct can't determine what y consideration was, and y parties
are not supposed to know what constitutes a good consideration,
yt being a matter of law, for y Ct to determine - 1. Co. 176
En Eliz. 394 - 2 Bl. 151. 2 Co. 15. a. - 2 Roll abt 783-

But a deed of conveyance for "value recd" has been held 3 Bl. 484 -
to express a satis consideration - for y parties are supposed
to know what value is, for yt is a matter of fact, and as

and as to y amt of y^t consideration, y^t is immaterial
as to third persons, for they may investigate it at any rate.

But where y deed is expressed to be for divers good considerations
y^t Grantee may aver and prove a specific consideration
either valuable or good, for in y^s case y deed stands as if no consideration
between y^t parties were expressed - in wh y Rule is y^t a consideration may be
proved - 1. Co. 17b. a. 2. do. 16- 7. do 39. b. bracketed 44. 5 Co 26. a. b.
Now another to be proved 4 Cruise 38.

1. Foli R. 139-

2. do. 342. 2

3. Wm. 202

1 Ves. 127-

1 Ves. 127

A deed expressing no consideration in Terms, if it appears to
made to a child or other near relatives, y deed imports to
be for good consideration, tho' y^s relation is not expressed as y
consideration. & no averment in y^s case is necessary, y^t y considⁿ
was kindred -

The particular species of Con Assurance, to wh a good
consideration is adapted is y^t of a contract to 'stand seized'

Where in consideration of 70 Pounds, wh was expressed
to be rec^d from A. Lands were limited to A for y^s -

1. Co 17b. a.
7. do 39- 40-
2 do - 75-

with remainder to B & C it was held y^t an averment y^t
y deed was given as well in consideration of a marriage
between B & C - as well as in consideration of y 70 £ pd
by A, was good - for in y^s case to be contended y^t y
to B & C was voluntary, quia y 70 pounds came from A, and
must ergo be applied to his Estate for y^s - But y Ct held y^t it
might be found, or proved y^t y consideration of y rem^t was a
marriage between B and C - for proving such consideration, was
consistent with y deed and with respect to B and C - y case
was y same, as if y deed did not express any consideration -

There are some Cases wh at first sight appear to contradict
y^s Rule - It was there sheld - y^t where a considⁿ was expressed
in a deed, no averment of any other consideration was admissible
But y^t Rule applies only to y parties to y deed -

It is a Rule yt where there is a specific considn is expressed,
as between those parties no other consideration can be proved -
so yt in y (2. P. Mm 203 - 1. Dec 127)

Further where there is a specific consideration expressed, no other
can be implied from y face of y deed, even tho' one might, have
implied, if none had been expressed

The only proper considn for a count the stand seized, is a good ^{to y use of another.} T. Co 39. B.
consideration - A Summary considn is not adapted to y sort of
conveyance - So yt if a y father enters into y sort of conveyance
with his son, in considn of 100 to him to do, in yd y considn of ^{40. B.} ^{Plowd. 304} ^{a - 1. Role} ^{Re. 68 -}
kindred cant be implied or proved - For tho' it appears yt y
grantee was y son of y Grantor on y face of y deed - yet as it
imports to be for money, it appears yt y creation of y parties wa'nt
y consideration of y deed - Co Lm 186. 5. Co 97. a -

Contr 1. Polm 81. Inge G. incorrect says there are.
Hence if a deed is made by father to son and no considn
expressed and if it appears on y face of y deed, yt y parties were
thus related - y considn of kindred or natural affection will
be implied -

The acknowledgment in a deed of y receipt of considn is not
conclusive as y Grantor in a collateral action, In y case 2 do. 39 -
tis only presumptive of or prima facie evi of y receipt - Post 470.

Hence if y Grantor acknowledges y receipt of y considn, and ^{3 Polm 402 -} ^{an annual}
y Grantee gives y Grantor ^{a note} for y considn, y Grantor may still - Count Rel.
recover on y note - For y acknowledgment is inserted pro forma Brace is
only and for y sole purpose of protecting y Grantee's title - Catlin -

III Requisite -

is yt it be written or printed on paper or parchment -

2 Bb. 297 - Co Lit 229 - 4 Crim 25.

It seems a writing on any other substance is not good -

The deed may be in any language or character. Ibid.

By y C L writing is not necessary for y conveyance of land;
A lease for yrs at C L may be created by Parol, and a freehold
transferred by livery of Seisin with any written Evi
2 Rll. 310. 13-

Test Int
Seoffm. or Livery
is long disused,

But now By y Eng St 29. Ch. 2^d - no interest in lands,
tenements &c, can be created for a longer term than 3 yrs ni
it be in writing and if made for a longer term ym 3 yrs
it will enure only as an Estate at will, or now as a Tenancy
from yr to yr - 2 Rll. 297. 306. Rob St Brand. 240. 47-
1. Bacon 12.

Writing is required in y country for y conveyance of Estates,
& I G presumes in all cases.

And y deed must be written, before it is sealed or delivered,
If one seals & delivers a piece of blank paper to another with
direction to fill it up as a deed, it will never enure as a
deed - for a deed if it takes effect at all, must take effect
from its delivery - 4 Cruise 26. Touchstone 54. Perkins sec 48.

The rule is differt in y case of bills of exchange - and Promissory
notes - These are scriptole contracts - and y formal delivery of ym
is not necessary.

Fourth Requisite -

The subject matter must be legally and properly set forth, It
is not however indispensibly, yt what are called ~~and~~ orderly
parts of a deed, sho be set in one regular order, tho' it is
usually done - 2 Bl. 297. 8. Co Litt. 6. 225. 4 Cruise 323.

There are 8 formal parts in a deed.

1^o. The premises - These contain y names of i Parties and yr

additions -- y necessary recitals, i.e. y clauses beginning with a
 "Whereas" -- y consideration, y description of y subject matter to be
 conveyed and y exceptions, if any, out of y subject matter described
 4 Cruise 33. 2 P. 298-

The omission of y Grantee's name, in y premises, don't vitiate
 y deed, provided he is named in y habendum, as to have and
 to hold to A. B. and his heirs forever - Co Litt 7- Shears 75
 4 Cruise 410-

A wrong name in y premises may be corrected in y habendum
 and rejected as surplusage

And where y name of y Grantor was omitted in y operative
 words of y Grant, but y considⁿ was expressed to have been
 pd to him ^{ie a b} y deed was held to be good - beginning

"witnesseth yt in considⁿ of 100 £ pd to said ab (not named
 before) doth bargain, sell &c - 4 Cruise 419. Talk 341-
 10. Mod 40-

Any mistake in y description in y parties in y deed, has y
 same effect, as if y mistake was in a devise

If y deed gives y Grantee a description wh applies to one person
 only, tho' y name be wrong - y deed will be good -

But if y proper name is mistaken & an addition or description
 given, wh is applicable to more yn one, then y deed will be
 void for its uncertainty +

As if a grant is made to George. Earl of A and his name
 is John. still y deed will enure to y Earl of A, for there is
 but one person answering y description - Co Litt 3. a. 4 Cruise. 34 -

So if a grant is made to Sarah y wife of P. when his wife's
 name is in act Mary - still y deed will be good, for y description
 is applicable to only one person. Indeed a deed to y wife of P.
 with more -

But in ordinary cases, a grant to one by his surname or christian name only will be void.

And a Surname acquired by reputation, is as good as one acquired by descent, or inheritance - as a grant to an illegitimate child -

And a party may in many cases be described without any name as y wife, oldest son, issue &c &c - and a deed limited in y manner will be good - *Ibid* Co Litt 28. a. 4 Crense 35.

2 ^d

The habendum and tenendum follow next in order. The proper office of y habendum is, to designate y quantity of interest conveyed by y deed - tho' yd may be effectually expressed in y premises, y usual mode is y former - as B. A. to A. to hold to him and his heirs - 2. Bl. 298. 4 Crense 46. 7.

But where y quantity of interest is expressed in y premises - it may be restrained, enlarged, or qualified in y habendum. If ergo a conveyance is made to A and his heirs of his body in y premises - habendum to A and his heirs - In y case he takes an Estate Tail with a fee simple expectant - i.e. an estate tail descendible to his General heirs with a fee simple expectant on its determination - Co Litt 21. Cro. J. 476. 2 Roll. B. 298.

2 Bl. 298. Suppose y last example to be reversed as to A and his heirs, to have and hold to him and the heirs of his body, now according to some he takes as before, i.e. an Estate Tail, i.e. an Estate Tail with a fee simple expectant - Cro. Jam. 476. 2 Roll. B. 1973.

But kata a preponderating weight of authority - A takes an Estate Tail only - for y Gen Rule is, yf y expressions in y premises are to be restrained by y habendum and y habendum is to be considered as an explanation of y premises - 8. Co 154. B. Co Litt 21. m. 2.

183. 299. Perks. 35. L. Crense 154 - yd y best opinion. Gould gives, grant, &c, B. A. to A and his heirs, to wit y heirs of his body.

If however y habendum is totally repugnant to y premises, it is void.

for tho' it may enlarge, restrain, or explain, yet it may not
totally contradict y premises - For tis a general rule, in y construction
of deeds, yt of 2. clauses in a deed, y first will govern y construction.
In wills, y Rule is directly y reverse. If a grant is made
to A and his heirs, habendum to him for life, y habendum
to him for life is void 2 Bl. 298. Co Litt 299. n
Touch. 88. 1. verm. 30-

The Tenendum was olim used to express y Tenure by wh y land was
to be holden - This was formerly necessary - 2 Bl 299. 4. Crui 947.
as all y military Tenures were abolished by St. Ed. 2^d - and turned
into one common Tenure, the tenendum is now of no practical
use, yet it is still preserved in all y forms -

Reddendum

This expresses y Terms to be complied with by y Grantee or
lessee as paying or rendering 100 £ pounds rent - 8. Co 71-

Touch 80. 81
4 Crui 47. 8-
2 Bl. 299-

Condition

This requires no explanation, as I have treated of condition
satis already 2. Bl. 299-

Warranty

comes next, by wh y Grantor for himself and heirs warrants
y Estate to y Grantee - 2 Bl 300 4 Crui 49. 58-

In yo case, if y Grantee is evicted and y title fails, y Grantor
is bound to convey other lands to y Grantee of equal value -
and yo he may be obliged to do, either upon y
y Grantee or by writ of Warrantia Charta -

by 2 Bl 300
3 Crui 49
Co Litt 365 a -

This is to be by Larning lands of equal value -
as to Lincial and Collateral vide Bl 2. 300-

Warrantys are either express or implied -

In y Modern practice, however, warranties are superseded -
by what are called covenants, so yt in modern conveyances, a clause
of ~~conveyances~~ covenants is inserted, in y place of y ancient warranty -

16.
In y ancient ~~deeds~~ deeds counts followe warranties and made a distinct or seventh part - Now Counts are used in y place of warranties -

The counts in a deed of conveyance, are agreements, by wh^y one party stipulates beneficial to y other, as in a lease on y part of y Grantor - yt he has good right to convey, and yt y Grantee shall quietly enjoy y same, and on y part of y Grantee yt he will quietly pay rent - 2 Bl 304 4 Cruise 64

Plowd 138-

The usual counts in all deeds of conveyance, in deeds of release or quit claims are first, yt y Grantor is well seised in y case of a freehold grant and has good right to convey, or yt he has good title where y Estate is less yn Freehold -

This is called a count of Seisin in Count -

Second, are what are called counts of warranty - i.e. yt y Grantor covenants to warrant to defend y title vs all persons, or in y case of a lease, yt y lessee shall quietly enjoy

Bac Cor C Kirby 1-

By ys Count, however, is only meant, yt y Grantor counts to warrant and defend y title vs all persons, or in y case of a lease shall defend vs all higher titles, but it don't extend to tortious claims - 2 Bl 304 4 Cruise 49 50, 66

1. Ves 54 4 John 11-

The principal difference in effect between a warranty and a count, yt in y former, y Grantor is bound, and as y case may be, his heirs, to assure to y Grantee other lands of equal value - in case of eviction by higher title - This is a real contract and binds y heirs, where they have assets by descent - but don't bind his executor - 2 Bl 304

A Count on y other hand, entitles y Grantee in case of eviction to recompence in damages only and not in other lands and always binds y personal representatives and not y heirs, ni they be expressly named nor even then ni he has assets from y ancestor - This count is then strictly personal, These are y

counts wh in modern practice have superseded y ancient
warranty - There is a variety of Rules under y head, for wh. see
Count broken - Co Litt 378 2 Bl 304
via Count broken -

But with regard to y effect of a description of land conveyed
I observe, yt if y land is described with its abuttals or bounds
or by courses & distances - ~~proviso~~

y Grantor in y case is not liable on his counts, provided
proviso y lands answer y description, even tho y deed shd mention
treble y number of acres, wh in fact it contains -

For y description by abuttals, or by courses and distance always
governs in preference to y description by quantity -

One of these modes is usually pursued in y country, as first
I grant 100 acres of land bounded with on S.C. East on
West Etc -

Second. I grant lands commencing at such an monument,
thence running North so many chains, to such a monument
N, and thence to y place of beginning - 1 Root 528, 2 do 252
2 Mod 381 -

The Rule is y same, if y deed refers to another deed, or
document for y like description, for y description then becomes
a part of y deed containing y reference, if y lands correspond
with y description -

When y metes, distances Etc, dont correspond with y boundaries
or monuments mentioned in y deed, y latter will govern
rather yn y length of lines, distances, courses - &c, as beginning
at such a rock, thence running &c -
6 Wheaton 580

Now if y Grantee^{or} has a title but intentionally deceives y
Grantee as to y quantity, will an action for fraud lie?

Wd it not be an answer to y action, yt y Grantee might
have insisted on a Count in y deed as to y quantity -
or have y land measured - The action has been maintained -
See 2. Day 128 - 2 John. 52 -

If however land is described by quantity without abutments or courses. So y grantor is, it seems, liable in the case of a deficiency - For here y principal description is of quantity -

It appears always to have been conceded, yt y Grantor is liable on his covenants, if he qualifies y quantity by y clause "more or less" or other expression to y same effect -
As I grant 100 hundred acres, to A B "more or less" or so much "by estimation". If either of these restrictive clauses is added, then y Grantor is not added liable in case of a deficiency -

On y other hand, where y abutments y description is by abutments or by Metes, y words, "more or less" superadded, used it seems have no effect, tho' those words out of abundant caution, are added to every deed, where y quantity is mentioned -

Conclusion -

8th

The Conclusion -

This contains y date and execution of y Instrument - It may either express y date or refer to y premises for it. 2 Pl. 304 - 4 Cruise 39 -

But a date is in strictness no part of y contract - It is merely a written memorandum of y time when y contract is executed -

Our books say it is no part of y deed, but it is in fact a part of y deed or document, tho no part of y contract -

Old deeds were not dated - they (dates) became customary in y time of Edm. 2^d 4 Cruise 33 - Co Litt 6. d. 4 Pl. 337 - Yelv. 193 - Ch. B. 43 - 3 Pl. 304 - Ch nts -

The date is not then necessary at y date to y validity, and when inserted is only prima Evi, and may be contradicted, because tis no part of y contract - but in y case y onus probandi lies upon y party objecting - Anciently no dates were used in conveyances - Shep 1/2 - 2. Co 5 - 3 - 4 -

If then an impossible date is inserted in a deed, as y 30th of Feb, y time when executed may be proved by parol - So if there be no date - Co Litt 46 - 4 Cruise 34 - 2 Pl. 304 -

Salk 462. 3 -

(These are all y orderly parts of a deed -

If 2 deeds bear one date and manifestly contain but one agreement y wh best supports y intentions of y parties, shall be presumed to be first executed - 4 Cruise 34 - 1. Burr 106. 7 -

5th Requisite

Is y reading of y deed before y execution of it and y, as y case may be, essential to its validity - If either party before its execution desires it to be read, and it is not read to him, y deed will be void as to him, provided he is unable to read it himself and in y case, tho y deed shd be such, as he ordered

As to be made, will make no difference, for y mere fact y
y reading was refused, will make it void - Touch 70.1-
2 Ob. 374- 4 Cruise 27- 2 Co 3.9- 11 Co 27-

If on y other hand, a party is able to read, he then shd
read it himself, and in such case his request to have it read
and refusal, will not vitiate y deed-

Now a man may be unable to read y deed from various
causes as he may be illiterate - blind &c-

In such a case, if he don't request, y it may be read,
he will be bound by his sealing, tho' he were unable to
read it - 2 Co 29- B 11.

These Rules, however, don't suppose actual fraud, The party
objecting need not aver actual fraud-

If y deed is falsely read to a Party requesting it, it will be void
as to him, at least for y part read falsely - or it may falsely
read to him by collusion between him and y reader, for he shall
not be allowed to take advantage of his wrong - or fraud -
2. Co 3. B Touch 70.1- 2 Ob. 304- 4 Cruise 27-

When will y deed be totally void? When only in part?

If y part falsely read is so connected with y other, y both
parts shd take effect, if either, then y whole must be void,
1E. where they relate to one entire subject-

If one deed contains several distinct contracts, there y deed
may in part wrong be void as to part, while it remains
good as to y residue - 11. Co 27-8- Shep. 70.1-

6th

Sealing -

is necessary at C Law to every deed of conveyance and by
y St of feds &c signing is now also necessary - in most cases -
Signing is not, at C L. necessary, to any deed. Shep. 60
57- m. - 4 Cruise 27- 2 Arrils 26- 2 Ob. 305- Com. & Sait

12.

a. 1. Lurene is sealing necessary in Court.

In y^s State, signing is not only necessary by y^e St of Frauds but by a provision of y^e St relating to conveyances.

A deed may be executed by an attorney or agent, appointed for y^t purpose, but in such case, it must be executed in y^e name of y^e Principal - The proper mode of signing, is a b. by C d - his atty - 4 Cruise 28. St 705-2 East 142- 9 Co 76. D- 6. T R. 17. Ld Rayn 1418- There is however no particular form wh is indispensable -

If an Atty signs a deed, secus yn in y name of his atty Principal it binds himself and not his principal - St 705. 000- 1. T R 181- Chy R 24. 7- 9. Co 75-

But an Atty can't bind his principal by deed, nor can one partner bind his copartner by deed, without an authority by deed - One partner in trade may bind his copartner, however, by bill of Exchange, or promissory Note - and without such authority - Co Litt 52. a 7. T R. 207. Com & Atty C 1. 5. 4 T R 313-

The reason of y^s Rule is to be sought in y doctrine of Estoppel - One man can't be affected by way of Estoppel, through y act of another - nor he has subjected himself by matter of Estoppel -

But y^s rule must contemplate y execution of a deed in y absence of y Principal, for it has been determined, y^t where one executes a deed for another in y presence of y principal and by his verbal direction, y deed will bind him - This exception, B. trust, is founded in y necessity of y case - for were it not for y^s exception, a person physically unable to sign a deed, wd be excluded from making one - 4. T R. 313 - Alth the 218- 1. Sm. 306-

Several persons are named in y deed as Grantors, and one only of ym seals y instrument, tis y sole deed of y party sealing it, for as

as to others, no blank paper 5 Co 23 - Touch 72 -

Delivery

Every deed to be operative, must be delivered, hence arises a clause at y foot of y deed, "sealed and delivered" and y deed takes effect by y delivery, whatever may be y date -

It never takes effect, till delivery and in general from delivery
2 Bl 306 - 7. 4 Cruise ^{2d ed} 28 - 2 Co 4 - Shep 58. 72 - Plow 491 -

If a deed is made and dated during y Grantor's minority but sealed and delivered by himself, post he attains full age - it will bind him, Touch 72 -

So also without doubt, if written, dated and sealed during minority but delivered by himself, after he attains full age - it will bind him, Cowp 201 - ^{statute}

And tho' a deed shd be sealed by a stranger, yet if delivered by y proper party, it will bind him, for by delivery, he adopts y signing and sealing of y stranger as his own - Park 130 - 4 Cruise 28 - 2 Bl 307 - Pettes sec. 1. 30. 4 Cruise 38 -

But if an instrument is delivered before sealing it, it's no deed - for a deed takes effect from delivery and is delivered, Touch 58 -
^{i.e. in y same plight it was given.}

The act of delivery without any words spoken will constitute a valid delivery. 9 Co 137 Touch 58 - Co Dig Tit 3. Litt 36 - 49. Cro Elis 122. 356 -

So on other hand, there may be an effectual delivery in law by words alone without any act done - as where y Grantor said "there is my deed, take it" and he did take it.
4 Cruise 28. Co Litt 36. n 6. Comyns Dig. A. Tit 3. Touchstone 58

But if y Grantee take y deed without either y actual delivery or express consent of y Grantor, there is no legal delivery, as if he take it from y table without being directed. However if it be found by y Jury yt y deed was put there

with y intent y^t y Grantee shd take it, it shall be a good delivery Touch 58. m. 3. 1. Leon 140 - Com Dig a 3.

As y simple act of delivery is apt to be soon forgotten by y witness, direct proof of y fact is not required. Presumptive proof of delivery will arise from peaceable possession, either of y deed, or y Subject matter, & it shall be stronger for y unison of both -

The acknowledgment is here *proba facie* evi of delivery -
12. Count

A deed may be delivered to a grantee in person, or to an agent authorized to receive it, or to any stranger in behalf or for y use of y Grantee. A deed delivered to an agent, is regarded as being delivered to y Grantee himself. Touch 58. 7. 4 Cruise 28. 9. Perk Perks G. 1. 137.

There is y difference, however, between a delivery to a grantee or his agent, and a delivery to a stranger - In y first case it ipso facto takes effect - but secus in y second, where it may or may not take circumstances, wh shall be presently explained.

It must be here observed, y^t a deed can't be delivered to any effect, more yⁿ once 12. only one delivery can operate as such, for if y first was of any effect, y second shall be void, y second shall be void and of no effect, as a delivery - Touch 60. Perk 154. 4 Cruise 20, 29. This rule may appear arbitrary, but it is founded, on y reason, y^t a deed can't begin to operate twice -

But if y first delivery is absolutely void, a second may be effected, as in y case of a Femme Covert. Coup 201. 4 Cruise 24. 29. Touss. 60. 3 Burr 1805. Coup 201.

And in y case above cited, y redelivery operates precisely as if it were written, sealed, and delivered at y time of y second delivery - It can't take effect from y time of y first delivery, y^t being a legal nonentity, to wh of course no subsequent act can have reference or relation -

Again if a deed once good, becomes void, from any cause - as by loss of seal - a second delivery, sealing &c will make it good, but in y^e case y^e deed can't be said to begin twice - y^e resealing and delivery make it entirely a new deed - Touchstone 60.

But if an infant, or a person under duress make a deed, and post full age in y^e one case, and restoration to liberty in y^e other, it be delivered again, y^e second delivery is void - for y^e first delivery being only voidable and not absolutely void, was of course of some effect - It's not a legal nullity for it wd have remained good, if it had not been avoided -

Perk 154 - Touch 60 - 1 Roll arb Tait & N - 4 Cruise 29 - 5 Co 119 -

The Books however leave y^e last question in an unsatisfactory state - for why can't an infant make a valid redemption, as well as a Feme Covert - It may be explained thus - The re-delivery, tho' void as a delivery, operates as a ratification of a former delivery, so as to vest y^e title & retroactively - The second will also have relation to y^e first -

A delivery again may be either absolute or conditional - and y^e leads to y^e doctrine of Escrows -

A delivery is absolute, when it is made to y^e Grantee, or when y^e deed is delivered over to a stranger to be delivered over unconditionally to y^e Grantee -

But if it be delivered over to a stranger to be delivered to y^e Grantee upon y^e performance of some condition - or happening of some contingency, y^e delivery is conditional, and in y^e last case, till y^e condition is performed, or y^e contingency happens, is called an Escrow and not a deed - 2 Roll 307 - 3 Cruise 29 - Co Litt 36. a -

in y^e form of a deed
It seems, agreed, if a writing, can't be delivered as an Escrow - to y^e Grantee himself, it is then necessarily absolute, for y^e Grantor may not over any thing to his own delivery, and y^e

1 Post ¹⁸⁷ delivery completes y deed, he can't post delivery prescrive
 noye conditions. Cro Elv 520-884. Tones 59- 9. Co .37- Co Lilt 36- Hobert 246-
 1.6 a. n. 3- 5. or 8 Mod 218- Contra Cro Elv 835- Com Sig
 Salt a. 3. But I y thinky there are not now conds law- More 69%.

And a bond delivered to arbitrators, as is often y case, to be delivered over to y prevailing party, is an error. for there is here a condition -

The Rule holds to promissory notes not negotiable, which are here considered as deeds -
12. Count -

If y grantor upon delivering a writing to a stranger, to be delivered over upon condition, says, "I deliver you as my deed, to be delivered over upon certain conditions, the writing takes effect, tho' y consideration shd have never been paid - The Rule is founded on y words of y Grantor, "my deed" and y condition is repugnant and ergo rejected - This is good law, but harsh justice - 9. Co 137. a - Touch 59- 4 Crain 30- Co Litt 36-a- Com Dig Sait a. 3- Perkins-

But where a deed is properly delivered to a stranger, as an
Escrow, tis of no force till y condition is performed, So y^t if ^{may} Delivery may
y Stranger shd deliver it before performance: of y condition, be proved by
it will be void and will operate precisely as if y stranger by Parol.
had stole y deed and yn delivered it to y Grantee. 4 Cruise
29. 30- Touch 59- Park J. 108- 137. 42- 44- Touch 59-

So if y grantee shd by force, or fraud obtain possession of y instrument w/out having performed y condition, it wd be void - Parks § 134-42-4-

When on performance of y condition, however, t^{is} delivered over to y ^{delivery} ~~condition~~ was
y grantee, t^{is} absolutely delivered, and even tho' y stranger shd ^{was} inchoate, but is
refuse t^{is} deliver or shd destroy y deed, still, y condition being ^{is} consummated by
performed, y writing shall take effect - Touch 59. 3 C 35. B. y ^{being} performed

5. ibid 84. a. 1. & 99. B. 4 & 71. a. Cro. E. 512. Cro. Eliz
310- Doug 269.

In ordinary cases, where a deed is delivered to a stranger, to be delivered over upon condition &c. y deed takes y effect, from and by y second delivery, and by relation to y first-

But in cases of necessity (and those only) there are exceptions to y rule - Thus in y case in Cowp 201. where y deed vests y title from y first delivery, there being no delivery over, y takes effect by relation. ^{deed} Perks. L. 138.

Hence where there is no necessity, y title shall vest from y second delivery, but where there is a necessity, it shall take effect, by relation to y first delivery, or not as y case may require, "ut res magis valeat" quam pereat.

In other ^{words} where there is a disability or impediment to y effectual operation of y deed, y doctrine of relation will be applied to y case, if it will remove y disability, or rejected, if y deed wd be defeated by such application of it.

Thus if a feme sole delivers a writing, as an escrow, and then marries and during her coverture, y condition is performed, and y deed delivered over, y deed shall take effect by relation, for secus y deed wd fail - This is a case of disability at y time of y second delivery - 3 Co 53. B. Perk L. 9-140.1- Touch 72- Cro Eliz 447-
35-

In all cases however of escrows, y second delivery is but a consummating act, which may always operate by relation, not so of an original act. - There is nothing to w^h it can bear relation - It is both y inchoate and consummate act.

The delivery to y depository is executory - To be executed, when delivered over to y grantee -
L. 138

Again if one deliver an escrow and die, ^{and} y deed on performance of y condition, be delivered over, it shall take effect by relation

As y first delivery, for y death of y Grantor ipso facto, revoking
y authority of y Stranger, tis impossible, it shd be valid, ni
by relation to y first delivery. 3 Cro 3 Co 35. B. Cro Eliz 447-

And in both these cases, y deed wd be void, were it not
for y application of y doctrine. - But y rules of Justice require,
yt they shd be valid, and hence y fiction. And in y case of
Grantor's death before performance of y condition, y deed
shall take effect by relation, as delivered over or not, for
y performance of y condition renders y first delivery absolute,
"ex necessitate rei," 5 Co 84 B Touch 59-

Hence if one deliver a writing as an escrow, to be delivered
upon happening of y contingency of y grantor's death, y deed vests
y title at his death, from y time of y first delivery - Litt L. 66 -
vide infra -

It has been contended, yt an act of yd kind wd be an will -
But it is not, For it purports to be not a devise, but a deed
"in present" 1. Root 3. 160 - 2 do 383 - 4 Tay 66 - Litt L. 66. Co
Litt 52 - B. Bac Arb P -

In all these cases, provided y condition is performed, y second
delivery is not essential - The only use of it, is, yt will be a higher
Evi -

If one of sound mind make a deed of feofmt, and give
a letter of atty to a 3^d person to make livery upon it, and
yn becomes "Non Compos", y subseqnt delivery, he continuing Non
Compos Mentis" will be good, and vest y title from y time of y
first delivery - This is a consummating act. His power is not revoked
by y Grantor's insanity - The grantor cd not deliver, if he shd,
it wd be voidable, & to remedy even yd difficulty, it will take
effect by relation to y first delivery - He was then Compos, and
consequently bound by his deed - and y Grantee upon performance of
y condition is entitled to y benefit of it - Cro P. 512. Touch Co. Litt 310 -
72ⁿ 5 Cro Eliz 447 - 1. Co 93. B. 3^a do 29 a - 4 do. 71 - a Doug 269 -
Where there is A an inchoate act to be consummated by a subseqnt

act,

But if one make a power of atty to another to make a deed of conveyance originally 12, and to execute it, and die before execution, it can't take effect, for death revokes y power of y atty, and besides execution is not a consummating act - but y original act itself, wh can have no relation to a precedent act. Litt J. 66. Bac ab P. Touchstone 207. or 12. Co Litt 52. Bac ab. antk 3.

So if one make power of atty to another to make livery of a complete deed of Feofmt, and die before livery made, no subsequent livery of Seisin, will be of any legal effect for death revoking y power of atty - But why does y^s differ from y former case, where y delivery was good after y Grantors death? The distinction is founded on y peculiar nature of a deed of Feofmt - It is by its own provisions prospective, and not to take effect till delivery. The instrument is not complete before livery made - Livery is of y very essence of y conveyance - and y^s is y^s case tho y deed has been actually delivered - The rule in fact supposes a distinction delivery - Thus far of y first distinction - Ibid. 2 Roll 3.

2 Branch
of y Rule -

But where y doctrine of relation wd tend to defeat y deed, it shall not be applied - Thus if a person disseised make a deed of Bargain and Sale to another, who is also out of possession, and deliver y deed to a depository to be delivered to y Granter after Granter has entered, y deed shall take effect from y second delivery, and not by relation to y first -

However if it had been delivered over before entry, it wd be void in toto. Now if y doctrine of relation be applied, it produce precisely y^s effect - for at y time of y first delivery y Granter had not entered Touch 59. 3 Bult 215.

Co. Ebr 447. 3 Co 35 B. Co Litt 48. B.

When there is a disability at y time of y first delivery - and none at y time of y second - y title shall vest from y second and not from y time of y first delivery This is a Gen Rule - But it shall not operate so as to violate, y^s of a person's privilege

under a legal disability at y time of y first delivery -

Thus if A an infant, make a deed of conveyance, and deliver it to B to be delivered to C on y performance of some certain condition and B deliver it, post A attains full age, A shall not be bound -

And also if a feme covert make a deed, and y depository deliver it over post y death of y husband, y deed shall be void - for y authority was given under legal incapacity and ergo, voidable and in strictness void, and here y doctrine of relation is applied for y purpose of defeating y deed, and protecting y Grantor - If it were not applied, y deed wd take eff it, but it is a maxim, yt legal privileges shall not be affected by a fiction of Law. Perke 139. 154 - Com D. Part C. 5. Cro Eliz 440 - Cro B. 617 - Cro Car. 165 -

The Rule with its qualifications, wd stand thus - Where a deed is delivered as an Escrow - if y doctrine of relation wd tend to defeat it, then it shall be rejected - but where y Grantor is under a legal disability at y time of y first delivery, there is an exception in his favour. In such case, y doctrine shall be applied, tho it defeat y deed, and in fact for y very purpose of defeating y deed - and y object of y exception is to protect y privilege of y disabled person -

But a deed never takes effect by relation, so as to effect, or be affected by any collateral act - I.e. a deed may operate retroactively or by relation, only to vest y right or title, wh it intends to create or transfer - But as to intervening collateral acts, it can have no effect - whatever - Touch 73. 3 Co 36 a - 2 Boll 14 - 410 - Perke 1. 1. 25

Thus if a bond is delivered as an Escrow, and post delivered over to y obligee, under circumstances wh will give it effect, by relation, a release of all demands from y obligor, to y obligee, don't discharge yd bond - 3 Co 36 - a - Touch 73 -

So if a feme sole of full age make a complete bond - to be delivered over to y obligee on performance of certain conditions & then marry - post marriage, of course, she is incapable of making delivery, but y delivery is made, and takes effect by relation to y former delivery, for secus it wd be void. Wherefore she shall be considered bound by her first delivery -

But still if between y first and subsequent delivery by y obligee shd have given a release of all bonds, y bond shant be affected, for when he made y release, y ^{bond} bond was not her deed - nor did it ever become so ni for y purpose of creating y debt y debt and not for any collateral act

Again A makes a deed of conveyance to B and delivers it to SA - as an Escrow - A becomes non compos - y condition is performed, and y deed is delivered - Now y deed will take effect by relation, ut supra, and suppose y time between y deliveries to have been one yr, during wch A remained in possession, y Question is shall A be compelled to account for y mese profits with B - The shall not, for tho' y title vests from y beginning of y yr - yet B's title didn't accrue till y end - 3 Co 31 - a - 29 - a - § B - Com dig J. 5 -

Robert 7.

Com dig title information.

If a deed is made by A for y use of B, to be delivered with condition, yet it shall be good, when delivered, tho' B knew nothing of y deed, ni B shd dissent - Thus if A, a merchant here owes B in N Y - and wishing to secure him in preference to other creditors, makes a deed of conveyance to him and B don't hear of it, till a week post, in y meantime another creditor attacks - Now altho' wanting to y completion of y deed, is B's assent, and as y deed is manifestly beneficial to him - he shall be presumed to have assented, and will consequently hold during y intermediate time, to y exclusion

152.

of y other creditor - 2 Root 26- 4. Bay 395-

With regard to y gen presumption. See 3 Co 26.7- 1. Pls 165-
Pow. 138- Conts. 9- 1. Pow. Or 138-9. 2. Leon 233-

If a deed is delivered over to a stranger, to be delivered to
y Grantee & y Grantee upon Sender, refuse to accept, he
can never post claim it, and if he shd post obtain it,
with or without y others consent, it wd not help him -

The grantor may plead. non est factum - (a Coke doubt
as to y plea - Contra Co JG- 5. Co 119-6. 320a 26-B-
Doe Plac 260-2- Cro Elvi 54- Touch 66. or 76- 3 Co a. 26. B-

The reason of y Rule is y^s - "It's a sound and original principle
of Law, "that an offer on one side, accepted on y other, is a
good contract, or forms a good one" - but acceptance is necessary -
& y offer is revocable, if till accepted, a foriori if rejected -
3 TR 653- Pow. C 334- 3 TR 653-

Attestation

There is another requisite, or rather formal part of a deed,
"for at C Law. tis not necessary" viz attestation by witnesses -
2 Pl 307- 4 Cruise 314 Ibid

Anciently there was no subscribing witness to a deed, and
after y formal part, his testibus a et B- they did not sign
y^r names, but were merely called, as eyewitnesses of y fact -
Co Litt 70. 2-

The subscription by witnesses, ~~and necessary~~ is now usual,
and in y^s State is a requisite prescribed by St Law -
Pl 307. 8-

So also by y St, if Leases for more yⁿ one yr, are subscribed
by witnesses, they will be valid between y parties, and not
vs 3^d persons. See Little Town Clerk or Witness -

There are certain other St requisites, wh are not confined to y^s -

State, but prevail through y h I.

Thus acknowledgmt before a Judge or Justice of Peace, is essential to mortgages - all conveyances of land for more yn one yr; or they will not be valid vs 3^d persons -

Recording or Registering a mortgage or deed of conveyance is also required - This is to be done at length in y town or country, in wh y land lies, by y Clerk of said town or county, secus it shall bind only y Grantors, his heirs or executors, and subsequent bona fide purchasers or creditors -

The object is, to give public notice and certainty, yt all persons may know to whom all lands belong - Hence y deed first recd or recorded and noted by y town Clerk, will operate to y exclusion of y ^{prior} ~~deed~~ ^{deed} - i.e. it will operate prima facie and generally in fact. 1 Root 61. Kirby 72.

In N.Y. y registering is generally kept by y county Clerks. In some counties, however, tis kept by y town Clerks -

This last Rule, don't exclude y prior Grantee, if he has used due diligence in lodging it with y Clerk, for a man shall be allowed a reasonable time to record a deed -

Thus if P.G. shd make a deed to A, and ten minutes post make another to B, same premises, and B sends pos. note and has it recd - A shall not be excluded - He is not bound to run to have his deed recorded -

1 Root 500 - 2 17 2 237-87 - 1 Root 500 - 2 17 237.

In these cases it is supposed, ^{not} ~~not~~ to have notice of A's deed, and that he had, his deed, shall include the prior one, if it has unnecessarily been delayed from being recorded - Cowp 712 - 1 Ves 66 - 1 Fonblanc 28

2 Root 287. 2 17 238. 1 Root 618.

87 53

In Eng Cts of Law

y deed first recorder, is best reason, why y different Cts shd have made y distinction -

but only in some counties - The Rule itself is a mere construction of y St - The Cts of Law. admit tis unequal, they then shd have drawn y conclusion - and they ^{Secus in Eqty. if} first recording party knew of y prior party's deed - 1 Eqty Cases 758. 2 atter 275 -

not adopt y Rule of Equity? it depends on y construction of y Statute, and in
On in y - y it have done y - Johns 425 - in wh. case y Rule Eqty and Law
is laid down - A Subsegt purchaser tho' he recd his deed - y construction
shall not exclude y prior in any case, in y prior grantee has ought to be
been guilty of neglect - nor even then if he have notice of y same -
prior conveyance, for what difference can a mere lapse of time
have upon y Equity of y subsegt purchasers - acts?

If a town Clerk having recd a deed to be recorded, deliver
it back unrecorded at y request of either party, he is liable
to any one, who may be affected by such surrender - The Clerk
must in all cases, record y deed - 2 Root 85 - as a Creditor of
y Grantee -

In Court y Clerk must write upon y deed y time of y
delivery into his hands, and y date of y record must correspond
with it -

How may a deed be avoided -

If an instrument wants any of y requisites of a deed, tis void
as a deed - 2 Bb 308 - or in Law. it ant a deed -

it may be Evi of an agreement in a Ct of Equity -

A deed may also be destroyed by matter ~~ex~~ post facto, as by
interlineation, erasure, or other material alteration - 11. Co 27
2 Bb 308 4 Cruise 26.

But if an alteration be made before delivery be
noted at y foot of y Instrument at y time of y execution or
delivery, y deed shall remain good - 4 Co 35 Touch 55 - 2 Bb
308 - § secus void - 4

This was y ancient C Law Rule, but now y Jury is to
inquire into y fact, an y alteration was made before or post
y execution of y deed, it will be void or not as y case may be -
10 Co 92 - Gibb Evi 104 - 2 Bb 308 -

There is a difference in effect between an alteration made
post delivery by y Grantee and an alteration made by a Stranger
if made by y Grantee y alteration, however trivial, y deed
will be void - 1. Co 27. a Fentk 234 - 2 Boll 29.

This Rule is doubtless intended to deter y Grantee from tampering with his deed, for ^{he} has every opportunity to alter it, if he chuses. Further if y deed contains several distinct covenants - - - contracts, and any one of ym is altered by y Grantee in a trivial point, y whole deed is void -

11. Co 28B-28. R. Shep 71- 2 Roll 30. Gilb Evi 106-

11. Co 27a.

But an alteration by a Stranger, ^{even post delivery} don't destroy y deed, no it be made in a material part, for y Grantee is not in any fault 11. Co 27a Cro Evi 626- 2 Roll 29-

2 Bulst 247. Cro Evi 626.

However a stranger alters y deed in a material part without y concurrence of y Grantee, yet y deed will be void, for in such case y deed as it stands, is not in law y deed of y Grantor -

But is y Grantee to lose y benefit of y deed?

C.G. thinks y Grantor may claim as for a deed lost or destroyed by time or casualty -

In these cases y Grantor may plead "Non est factum" for it is not his deed as it stands - 5 Co 119- 11. Abid 27. a - Cro Evi 626-

If in a writing intended for a deed, a blank is left in a material part to be filled up post y delivery, will not operate as a deed, but if a Blank is left in an immaterial point, to be post filled up. y deed wd have been good, so yt when it is filled up, it need not have any effect in order to make y deed valid - 2 Keble 872. 81-

2 Roll 29- Gilb Evi 107-6- 2 Do 35- Cro Evi 627- Bent 185- 2 Leon 25-

If a stranger shd alter a deed in a material point, he wd be liable to y Grantee, for in ys case y Stranger has destroyed ^{his} Evi. of Titte, and it is no consequence in ys action vs y Stranger an y Grantee can prove y contents of y deed - or no Cro Evi 628.

A deed may also be destroyed by breaking off y Seal, even tho it were broken off by casualty, thus where y Seal was broken off by a Mouse, y deed was held to be void -

If 2 are jointly & severally bound, or jointly bound in a bond - and y seal of only one is broken off, tis void as to both -

Seems if they are severally bound - 2 Bl 308 - 5 Co 23 -

11. Co 28. B - Doe Plac 259. 262 - 2 Buls. 248 -

Gibb 109 - Doctrina placitandi - Cro Elvi 546. 2 Thow 248 -

In such a case however as no alteration is made in y body of y deed, a Ct of Equity will regard it as an agreement to convey and will compel y Grantor to execute another deed - and y writt doubt wd be y case, if altered, proviso proof ed be obtained of y original contents, This they may do under yor general powers to relieve vs casualities, or to enforce executory agreements - 1. Font 14. 15 -

Third, a deed may be destroyed by y grantee's delivring it up to y Grantor to be cancelled - 2 Bl. 308. 9 -

Fourth a deed may be destroyed or avoided by a subsequent dissent of those, whose concurrence is necessary - to its legal operation - Thus if a lease for yrs is made to a feme covert here husband by his dissent may avoid y deed - and so of an infant - Shep 16. 3 Bl 309 -

By y subsequent dissent it here meant y refusal of an assent. wh was originally necessary to make y Instrument valid, ift dont mean y subsequent dissent of one or both parties will avoid a deed originally valid, for in such cases there must be a reconveyance. Co Ligamur quo ligatur - Shep 68. 2 Bl 310 -

Lastly a deed may be destroyed by a Judgment of a Ct of Law - or a decree of a Ct of Equity - as for fraud - 1. Vern 348 - 2 Bl 309 - 2 Pow 149 - to 163 - 2 Pow 143 -

If y Eng system of conveyances was adopted here, it wd be necessary to present a view of ym, in y present title, but they dont prevail here - 2 Bl 306 - 309 - 343 -

Construction -3
3 atts 136-

Deeds are to be construed, as near y apparent intention of y Parties as y Rules of Law will allow - 4 Cruise 415- Co Litt 36. a Plow. 154-

Or verbal inaccuracy, Bad English or false Grammar never vitiates a deed when y intention of y parties is plain - 4 Cruise 415- Shep 87- 9 Co 48. a Plow. 154. 134. 170-

Shep 87, The construction of every instrument is to be made upon y whole instrument, and not upon any distinct part, nor upon a series - Litt L 282.3 and y construction must be so made, if possible, yt every part 4 Cruise 416- may take effect - and tis a strong objection to a construction yt it don't give effect to every pt of y instrument -

Tis a general Rule yt y words of an instrument are to be taken vs yt party or y Grantor, whose words they are - J G concies ce yt ys Rule applies only to those cases of ambiguity - for in y case he shd have explained himself - Shep 87. 8. 4 Cruise 416. A

Co Litt 299- If 2 clauses are irreconcilably repugnant, y former will take effect, y latter be rejected, ni there are special reasons to y Contrary - Shep 88- 4 Cruise 418-

In construing releases or deeds of acquittance, there is a rule peculiar to yt species of deed, viz where general words of release stand alone, 4 Cruise 417- they are to be construed to give ym full effect, but if they are preceded by words of recital, they are then to be controlled by y recital - Bac R 2. Recd of a B. & F in full of all demands, I recd 10 B. 74- of a B. & F in full of a certain sum and all demands - 10 B. 390- in ys case. y words, all demands are held, words of form and used 3 mod 229- without reflection by y Party - 3 mod 277- Bac abr. Release R.

Where words in a deed will bear two constructions, one of wch is agreeable to Law and Justice - and y other not so, y former will be preferred 4 Cruise 417- y latter rejected - is Litt 422a. Void 183. B-

Words repugnant to y gen tenor of a deed and y evident intention of y Parties, are to be rejected - 2 atts 135- 4 Cruise 418- Hence an exception in a deed including y whole subject contained, will be void, for either yt or y deed must be necessarily void - 6. Brown P C. 351- 4 Cruise 418-

Where a subject or principal is granted, all y necessary incidents will
pass with y grant. If y Principal with y words "appurtenant^{ally}", the y^o
word is usually added - thus if one grants a house, he of course, he
grants with it, a right of way to y house - If he grants a mill, he of
course, grants with it, y privilege of water - When one grants y
Co Litt subject, all y means necessary to y enjoyment of it, go also - 2 Bl 36 - a deed in one
form. may operate

Is a very important Rule in y^e construction of deeds, and other instruments, ^{operate} as another kind of deed - if y^e writing drawn in a form, ⁱⁿ which by law, it can't take effect, may yet first and good operate as another instrument, "ut res magis valeat, quam pereat." If one makes a deed of bargain and Sale in consideration of hundred, now it can't operate as a bargain and Sale, but it will take effect, as a Covenant to stand seised and E^c Converso - and a Covenant never to sue a debt, is in effect, a discharge of y^e debt, and may be pleaded as such -

Shep 812 -
4 Cruise 420 -
Co Litt 301 -
Cowb 599 -
Phar 600
3 Lev 372 -
How 140 -

The cred, might still sue, but y debtor co recover back on y assent -
Where y terms of a deed are so uncertain, yt y intention can't be discovered
y deed will be void, as a Grant to a or B or one of y sons of P.L.
or y best man in a village - Hobt 313 - 4, Crut 425 -
Hobert.

In some cases where a deed is void in part originally, tis necessarily so in toto, and in other cases, tho void in part, will be good for y residue - If a deed contains several Counties, some of wh are illegal by y C Law and some Legal, y deed is good as to y legal, void as to y illegal - 11. Co 27. B. 11. Co 27. B. Shep 70.

But where any one stipulation or covenant is void in a deed, by 1. Pow. C. 199-
 St. Law. y General Rule, is, y whole is void - 2 Wils 350 - Holt 14- 199.
 The phraseology of St. Laws, renders y whole void, for y St. always
 declares. y whole deed. contract, void - 2 Wils 357. Hobert 14-
 1. Pow. C. 199. 205-

If there are several distinct clauses in a deed, some of wh^{ch} are truly read to y^e party, others not, y^e deed is said to be good for y^e part truly read, and void only as to y^e part falsely read - but neither y^es, nor y^e former Rule, as I conceive, can apply where y^e two acts (one of wh^{ch} is illegal, y^e other legal) are mutual considerations of each other, for y^e wd be in effect to make a new contract between y^e parties, or if by y^e terms, one clause depends on y^e other, or is a condition

11. Co 276-
Shep 76-

of y other, one can't be void, ni y other also -

If two distinct obligations are written on one paper, one of wh is falsely, y other truly read, to y other party - and y contract is duly executed, in ys case, y one is void, y other good.
11. Co 27. B - 2 Co 3 B 9B - Shep 70 - 2 Roll 28 -
9. B

quia
quia an entire sum
is one indivisible
aggregate, and
can't be separated.
cant

If y deed is void in part, as to an entire sume of money, or any other any entire thing, tis necessarily void in toto.
If A agrees to give B. a bond for 20 shillings and y Seruener draws a bond for 20 £. and reads it as a bond for 20 Shile, yet it wont be binding even for y Twenty Shillings, for yt was not named in y bond.

11. Co 27. B. Shep 70-

If a conveyance is made to two persons, one of whom dissents, y part intended for y party dissenting, remains in y Grantor - 2 Day. 395. 3 Co 27. 8. Com. Dig. Baron and
Same Re. 1. Roll 349.

Perkins. L. 66.
4 F. 472.
1. Hen. 8. 614.

This is diferent from y case of a deed made to two persons, one of whom is legally incapable of taking under it, in yt case y deed is in legal effect, a deed made to one person only, but in ys case, y deed in its creation, a deed to both, tho voidable to either of them in case they dissent -

Conclusion of Title

By
Deed - Midnight vel somnus decipit
C 110

Title by Execution

By y C Law, and by ours, an interest in things Real may be acquired by execution, by wh term is meant y last performance of an act, as of a Judgmt, and is y obtaining y possession of any thing recovered by Judgmt of Law.

By our St Law, y^s has become a very common mode of acquiring y title to an estate in Land, It's also frequent in Eng. tho' y laws of y two countrees are very different on y head.

By y C Law, y only executions yt cd be vs y party originally - quia tis diffon liabls, in personal actions were y "fieri facias," and Levare Facias - with y Rever at Law - to wh was post added y Capias ad satisfaciendum, The Rule was different with respect to y heir. 3 Co 11. 12. 3 Plb. 414-18. Com Dig Ex c bond. 2. 3. 9. - Bac. Abr. x. c. 3. -

I speak of executions in Personal actions only, for in Real actions they are not y mode of acquiring originally property, but of enforcing Seisin or possession of a title already executed.

Upon y first of these writs, y goods and chattels of y Def- Real as well as Personal may be taken 3 Co 171. Com Dig Ex c - 0. 4. Ibid auct 3 Plb. 417. Bac. Abr. c. 3. Co Litt 290. B. 3. Co 12. 8. 20 171.

And y property thus taken is to be sold by y Sheriff for y Exco Satisfaction of y Judgmt - or execution. 3 Plb. 417. 8. Co 171. Com Dig Ex c. 4 -

Upon y second of these executions, y Sheriff may take y goods, and profits of y def^d land, not only chattels, but growing emblemts - This can't be done on a Faciās Fieri, y terms not authorizing it - 3 Co 11. 12. b. Cumberb. 470 - 3 Plb 417. - ibid - Com Dig Ex c. 3. 3 Co 11. B. Bac. Abr. ex. c. 4.

On y^s execution, may also be taken debts due to y Def^t. The Lessee may be compelled to pay y Rent to y Plf in y Execution - Plow. 441 - 3 Plb. 417. Bac. Abr. ex. c. 4. or creditor of y Lessee - Com. Dig. Ex c. 3. 3 -

On these 2 executions then, y whole personal Estate, w^h necessary wearing apparel, is liable to be taken for y satisfaction of y Judgmt. 2 Bac Ex c. 4. 3 Co 12. Comb 356. - Bac. Abr. c. 4. - Ex

3 Co 13.

Bac Ab. ex. c. 4.
Com Dig Ex. c. 3.

But on neither of these can y Exe land, They extend by y^e terms only to y^e Personal property of y^e debtor, "There is indeed, at C Law, no execution yt issues vs y^e land of y^e debtor in his lifetime, and and in y^e hands of y^e debtor's heir wh he has by descent may be taken. The Rule is founded upon reasons purely feudal; "For on y^e same principle. a man cd not alien his land directly - He was restrained from doing it indirectly by charging it with his debts

3 Co 418-

Now at C Law. does any execution reach fixtures belonging to y^e debtor, such as fences, windows, doors, wh tho' strictly personal yet being annexed to y^e Freehold, are deemed part of it -

1. Lat. 368. 1. Roll 891. Com Dig. Ex. c. 4-

There has been a vast deal of dispute as to what articles, are fixtures, and what are not. See Eas. & Adms.

The third species of y^e C Law execution is y^e Ca Sa - under wh y^e body and body only may be taken. At C Law. y^e Writ wasn't in all cases allowed - I was restrained to those cases in wh y^e injury, for wh y^e Judgment was obtained, was forcible - It was allowed in y^e class of cases by reason of y^e breach of peace involved in every such injury - 3. Co. 12. Co Litt 289-90-B. Com Dig Ex. B. 3- C. 2-9- Bac Ab. Ex. c. 3- It was allowed as a sort of penalty vs y^e offender for having broken y^e peace -

At C Law. then on a judgment recovered on any action than one vi et armis, y^e Plt^y had choice of only y^e first do - auth

By It 52. Hen 3^d. Westm 2^d 13. Ed. 1. § 25. Ed 3. y^e writ of Ca Sa was extended to actions in any civil case with some few remaining exceptions - 3 Co 12. & 2s 88- Co Litt 59B- Co Litt 59. B. 2 Buls. 63.

But on a judgment vs an heir "at Law" as such, on an obligation of his ancestor, y^e Plt^y might have an execution, on y^e lands he inherited from such ancestor - 3 Co. 12. a - Com Dig Ex. c. 2. Pleader 2. c. 6 - Plow. 440-41- n. 2. " Cro J. 450- 2 Bac. ex. 328- b

This Rule was founded on y^e necessity of y^e case, for y^e heir is

liable to his ancestors specialities, in consequence of assets by descent.

But y property derived from y ancestor is to be liable - it must be 3 Co 12. a Real property it can't be any other. If this were not y case, y Plt^f wd have a legal right, without any coercive remedy to enforce it -

But it can't issue vs land, wh y heir has by purchase. The terms of y writ don't extend to such property - 3 Bac. 12. a Com Dig. Ex. c. 2 -

Com Title Pleader. 2. 2. 6. Plow. 440. 41. note

And in all cases, tis only extending on y land as a breve in vadum, to be held till y rents and profits pay y debt - The Plt^f don't acquire y Fee - The execution can never have y effect - Plow. 439 -

But in virtue of certain Eng Sts, real Estate may now be taken on execution vs y original Def himself. 1 West. 2. 13. edn 1. By wh y Plt^f is entitled to an elegit extending to one half of the land of y debtor and half y goods and chattels, They are to be appraised and delivered to y Plt^f, but not sold as under an execution at y C Law - The half only of y land is extended, till y rents and profits have satisfied y Judgment - The Fee don't pass by Elegit 2 Bl 161 - 4 ibid. 3 do 418 - Com Dig. Ex. C. 14 - 3 Bl 419.

There are 2 other Eng Sts wh subject y land of y debtor somewhat further, The Sts "de mercatoribus" of 13. Edw. 1. & 27. Edw. 3. subject all land as well as y person, and goods of y debtor, to an execution on y forfeiture of y recognizance, on a St Mercht, or St Staple -

But in these cases, y land is only extended - There is no Eng St under wh an execution will pass a Fee - 2 Bl 420 - 2 it 160 - 289 -

Herbert 131.

3 Bl 420.

But in y^s country y Fee simple of land will pass by execution, and so of an less interest - (Not in Virginia) In Court there is but one species of execution in personal actions, and y^s issues vs y goods, land and person of y Def - The Eng distinctions are abolished -

By our law, when goods are taken upon execution, they are to be sold at y end of 20 days and a sale before or past y^t time, is illegal -

There is a provision in our St, y^t if there is personal property satis to satisfy y execution, tendered to y Sheriff - he can't take y Real -

It has ^{been} long disputed, an money can be taken, in some cases, it has been denied - but y Evidences as bonds, notes, &c., cant in any case be taken -

The Eng Autos are rather in favour of seizing money, and it wd seem to be y most proper of all property to be seized. 2 Show 166. 3 Co 11- Doug 219- 230- Armstrong vs Philpot - Hard 48- (3 East 48- Contra -)

In Court money may be seized in execution -

1 Root 216- and y is in accordance with y Supreme Ct of y U S. 1. Cranch 116- 134 1. 1 Cranch there may seem to be a little difficulty - but it arises from y circumstance - y money was in y hands of an Atty or Sheriff in favour of A, and on an execution vs A it was held yt it had not become y property of A, & as it wd have been liable ~~to~~ y

In y Eng C Law, if y Sheriff is doubtful an y goods sought to be seized belong to y def. or not, he may summon a Jury to ascertain y fact, and if he don't, he acts at his peril -

But notwithstanding y verdict, if he wrongfully seizes, he is liable to y Real owner. 1. Burr. 29- 9- 1 Bl R 65. 2 H Bl 438- 4 I R 643. 48-

What then is y effect of y inquisition? Tis thus. If y Jury find ym not to belong to y def., y Sheriff shall not be sued for not taking ym, and y is y sole use of y verdict - Tis no Evi for or vs third persons. 2 Hen Bl 437- Pea Evi 85. 1. Str 68- 3. Maul et Selu 175-

And if y Sheriff make a wilful false return of nulla bona - y inquisition won't justify him, it won't be Evi in his favour -

But if y Sheriff is guilty of no fraud, he is not obliged to seize ym post y verdict - In y State, we have no such enquiry - The rule in our Cts, is y. If it appear. yt y Sheriff had reasonable ground to doubt y ownership, he is excused from taking ym -

Where an officer seizes goods on execution, if they prove insufficient -
to satisfy y debt, he may make a 2^d or third seizure -

Bac. Abr. Ex. l. Com Dig. sec. h. 1. Felton 91.

under our St, y whole interest of y debtor in y land, may be taken
in execution i.e. of land held in his own right, in wh he has a 12. not as
beneficial interest, and not a mere nominal title. At y C Law. Trustee,
it wd imply y legal Estate, but by our St, tis predicated of
a Trustee - Thus y interest of a husband in an Estate of his wife -
is an interest holder in right of his wife - But yet his life
Estate in it may be taken - So yt not to hold in ones own right,
is meant to hold as a trustee -

Our St extends to all estates, in lands and Tenements whatever,
and by construction its Equity of redemption and all equitable interests -

1. Day 930. 2 Root 115 - This is not y case at C Law. 8 East 468 -
2 New R 461 1. Day 96. 93. 8. East 467 -

as to y mode of selling of an interest, y Rule is,
yt y Sherf must make demand of y debt at y place of y Defts-
abode, if within his precincts - secus y seizure is not valid -

1. Root 241. See Count actions Civil -

And if Real Estate is taken without such previous demand, y levy
of execution is illegal & confers no title -

So also if satis money or personal property is tendered, and y
Sherf refuse to take either, no title shall vest - This previous demand
must appear upon y Sherf's return, or no title will be acquired -

in returns made before 1800, all since Aug. 1. must mention ^{demands} previous demands

The second step, in y proceedings, is, yt y property seized is appraised, of personal
by 3. indifferent persons, freeholders of y land, and under oath - ^{personal}

2 Root 434 - 1. Day 109 - The word 'indifferent' is construed to they are to choose
exclude any person related to y party, as uncle, nephew - by ^{one a piece} ^{and agree}, an
affinity, or consanguinity - 1. Day 109. ^{some how or nother - as to}

The Sherf is bound to endorse all proceedings, as demand, 15 y 3^d -
appraisal & on y execution, and to have it recorded in y town -

of the Def offer and also to deliver to y Clerk of y Ct, from wh y writ issues, y amt due including to be recorded, and y execution thus recorded completes y title. Costs, before y 1. Root 489-557- execution is recorded,

Th. must accept under our Law, there is no such thing, as extending land - ym- or it- The whole interest must be set off in yt part wh is seized-

Day 5th There has been much dispute with regard to taking growing & C. Contrap- emblements - The practice has been to take y growing crop - it may be consent where y Def was tenant for a short lease - then to sever and tho. illegal, sell it at y sign post - This is not justified by our Law. tho it is by y Eng - The regular mode by our Law, wd be prop. i may be taken to take y whole interest of y Lessee in y land by appraisal under y Le Fa - in Eng.

It has been determined^{yt} under our Law, a levy of execution upon land, post y time when y execution by its terms is made returnable, is void, tis of no effect, post such time - 3 Day 1. 1. Root 101- com. Dig. ex. C. 4 Take 368

Our executions are all made returnable at 60 days post date, or at y next term of y Ct, and if y time has elapsed, y Judgmt can't be enforced except by praying out an "alias" ^{alias} If however a levy is begun before y day of return, it may be consummated post it has elapsed, and y subsequent proceedings take effect by relation to y day of return - 1. C. 99. B. 3 bid 29. a - 4. ibid 71. a Doug 269. a - 1. Root 101- 3 Day 1. what is y same reata Law.

and if the Th don't return y it merely vests his title in y Plt and if y Def refuse to deliver up rec, y Plt may y possession, y Plt must have recourse to his action of ejectmt. prosecute him - for y Def shall not be ousted without an opportunity of enquiring in Court - into y justice of y proceedings, and if he can^{shew} they are irregular or yt y Judgmt & C are void, he may do it - 3 PR 293 - 5. 8- Bac. Abr. ex c - 32 Show 85-

An alias execution is in general issued as a matter of course - in there has been an unreasonable lapse of time, there is no need

185.

of applying to y Ct, y Clerk may issue of course -

Where y execution is wrongfully endorsed, "Satisfied", y Plt^y may obtain another to enforce y Judgmt by "Scire Facias". But not on motion - Suppose y Sheriff has sold y land of a stranger - y Plt^y of course can't hold. Now to prevent inconsistency on y Record - a Scire Facias is issued, for there wd seem appear to be 2 satisfied executions & no explanation given - The Scire Facias wd reconcile these apparent inconsistencies. 1. Root 453. Pol Com. Dig Ex a - 3. R. 5 Co 86.7. Holt 60 - Lach 193 - Bac. Ex F. Com Dig ex. F. Bac. ex. F. Robert, Com. Dig. Plead 3. L. 1. 2 - There are many cases, in wh a new execution may be obtained, on Scire Fa - as if Def die in Prison -

In y^s State, there is no time limited within wh a new execution can issue as a matter of course with a Scire Facias -

In Eng. it may so issue post y expiration of a year and a day, and y reason is. yt by a lapse of time, y presumption is raised, yt y Judgmt is satisfied - tho' y onus probandi is on y Def - Bac Abr. Ex F. Carth 30 - Cro Jam. 364 - Com Dig Pleader 3. C. 1 et 2. Ex 1. 4 - 1. Selwin 350 Carthay 30 -

This Scire Fa is given in Personal actions by 1 West 2. 13. Edw. 1. But in real actions, a Scire Fa. lies at C Law - independantly of y Ct, and without limitation. Ibid Co Litt 290. Faltk 258 -

In a real action, if y Plt^y die after judmt rendered, but before execution issued, it may be sued out by his heir at Law by Scire Facias -

If y action be personal, y same is true of y Ex or adm - but Scire Fa is in both cases necessary - Com Dig Ex e - 1

Pleader. 3 L. 1. 5. 13 - Bac Abr. Scire Fac. C. 5. 1. Roll 589 - and y reason why y Scire Facias is necessary, is yt y heir or Ex is not y original party, and y Ct don't know, nor will it enquire on motion, an they are y true heirs or ~~not~~ Exs - The Scire Fa. remedies

these difficulties -

But in either case, if y Pltfs death happened after y execution, is issued, but before satisfied, there will be no necessity of a Sci Fa. Bac Abr. X. c 4. Com Dig Ex F. Plea 3. L. 1. Lalk 322v

If a judgment is rendered vs two persons, and one dies before execution issued, it can't issue vs y Survivor alone without a Sci Fa - for y fact of y Co Defs death don't appear on y record - it wd seem yt judgment had been rendered vs two persons, and execution issued vs one only. Ray 26. Bac. Abr. ex. g. 1. 1. Rolle 92. 123. 1. Leo 130. Com Dig Pleas 3. L. 13. The same Rule holds where one of 2 Pltfs dies before execution -

If Judgment has been rendered vs one, who dies before execution, leaving land in Fee Simple to his heir. An Execution may by a Sci Fa be obtained vs y land in y hands of y heir. and yd also to prevent inconsistency on y Record - Bac. Ex 9. 1.
Cro Jam. 186. Co Litt 290 -

This however, is one of those cases in wh y heir, at law. an infant, is entitled to have y proceedings stayed, till he is of age - Ibid. 1. Rolle 140.

In y same case however, y Pltff may at his election, sue out an execution vs y personal representatives. Com Dig X. F. Plea 3. L. 6. Bac. ex 9, 2

But if an execution has issued before defs death, there is no need of issuing a new one. Com Dig ex F. 2. f Cro Eliz 181. 2 bent 218. Bac ex, c. 1. Leon. 144 -

But these 3 last rules can't obtain in yd State. Here if a man die post-judgment rendered, and before execution issued, or after execution, and before it is satisfied - yt judgment can't be enforced - a new execution can't be obtained, neither can y old one take effect. This wd defeat y Genius of our average Law, or pro rata System - or Marshalling assets -

The creditor is in y some situation, yt he no be in, had he
a note of hand, he must present his claim to a Ct of Probate
who will treat kata his deserts.

If Judgmt is given vs husband and wife, and y husband
dies before y execution is issued, it may be prayed out vs
y wife alone by Sci Fa. Cro Ch 518.26. Com ut Supra -
Reble .05. Bac abr. Baron Fenne - And y same Rule is true of
y husband in case of y wifes death, for y reasons before
mentioned - - - Bac. ab ex.g. 4.

Finis of Title Execution

Devises

Requisites 207. It must be in writing 1st. 2. Signed by the Testator or by some one in his presence and by his express direction - 3^d Attested and subscribed in his presence by three or more credible witnesses and the witnesses must attend to three things - 1st Sanity of the Testator - 2^d his Signing 3^d his Publishing
 208 Things devisable under St Hen 8th
 223. Who may devise 217.
 Things devisable under St of Henry 8th
 223. Estates created by devise may be Absolute or Conditional 226. Uses and Trusts
 227. Powers 228. Naked authorities,
 228. Those coupled with an Interest
 230. Who may take by Devise 231.
 Description of Devises 235. Special Description 243. General Rule 243
 General Rule 244. How may a devise fail taking effect 245 Patent Ambiguity 246. Latent Ambiguity 247.
 How far Parol Evidence admissible to explain or extend Control a Devise
 255 or 254 Exceptions to the Rule. excluding Parol Ev in the explanation of a Patent Ambiguity 260. Revocation of Wills 265.
 Conditional and Partial Revocation 280.
 Revocation under St of Frauds. 27. Ch. 2^d.
 Republication 286. Republication since the St of Frauds 290. Jurisdiction of Ct as to Devises 294. Giving a devise in Ev at Law 297. Proving a devise in Chancery 299. Note Implied Revocation and Republication remain as before the St of Frauds.

Title by Devise

This is y last mode of alienation, wh I propose to consider: or -
y there is a 2d C. This is a title wh comprehends a great variety
of learning - more so yn Deed - The Law is not so technical -

A Devise is a mode of alienation, wh may be defined a testamentary
disposition of Real property to take effect on y death of y owner.
Pow. Sec. 3. Bac. Abr. 497. Will.

There is a distinction to be observed between y words, Devise & Will -
I testament - A devise is confined to y alienation of real property -
A will in its proper and limited sense, implies merely y appointment of
an executor. 'Tis not essential to a will, yt property shd be disposed of.
If one says, "I appoint I & my executor" y constitutes a will -
If he superadd y disposition of personal property, then is also a
Testament and as they usually go together, y writing is called a
will and Testament. 'Tis true, the term Will includes y testamentary
disposition of all property, both Real and Personal. The St of
devises is as frequently called y St of wills, as of any thing -

But yet there is a distinction in terms - Lovelace 1. and 2. Bac. Will

The right of devising that property, is said, to have introduced among
y Anglo Saxons. But it was abolished in toto , upon y introduction of ^{new} feudal Law - 'Twas inconsistent with y system on y same principle, yt an
alienation "into veritas" was - 2 Bb 373.4 Pow. on Sec. 133. ^{County of Kent.}
1. Levins 79. Salk 237. ^{Kent}

But terms for y and chattels real were generally devisable under
y Feudal System, as well as personal chattels - Pow. 6. 2 Bb 374 - 10. Co 78 -
Pow 248. 3.

The suspension of y right of devising Real property, continued
for several centuries, from y reign of Hen 11. to y latter part of
Hen 8th - But during y period, y restraints were evaded
in a great measure by y doctrine of uses - created by ecclesiastics
(who held y great Seal generally) for y purpose of procuring
devises of Lands to y monasteries,

The ecclesiastical chancellors adopted y principle, yt tho y legal

title could not be devised, yet y beneficial interest might be so devised -

2 Blb 375- Pow. D 8-

A use was what This practice was checked by y St of Uses, wh transferred y legal estate to y use, thus abolishing y distinctions between y 2 estates, and consolidating ym into one, and hence it became impossible to devise Real property 2 Blb 378-5 Pow 2613- 236.8. Co Litt 11. note, person. dum

Legal title The Public soon became discontented with these restraints, was in another and only 5 yrs after y ^{St of Uses} St of devises was enacted, providing y all persons having a Sole Estate, or one in Coparcenary, or in Common or in Fee simple of Manors, Lands, and Tenements, shd have power to dispose of $\frac{2}{3}$ of those holden in Chivalry and of all those in Socage by writing and y^s it was explained by St Hen 8th, 2 Blb 375- Pow 140-1. 9- 216.19-

And as all Eng Tenures, ni those of Copyhold were converted into Free socage by St Cha. 2. by St 12. Ch. 2-, it followed y^t all lands ni Copyhold became devisable - Pow. 42. 2 Blb 77- 375-

Pow. 10-42-

Certain regulations were also made as to y mode of making y Instrument by y St of Frauds and perjuries - 29. Ch 2- prescribing requisites or solemnities to y devising instrument, wh has been followed throughout y Country -

Our St of devises is similar to y^t of Hen 8th, ^{but more extensive} ^{his St} extends to Fee simple Estates only, ours to all estates whatever - We have also a St similar in effect to y devising clause of y Eng St of Frauds and ergo y constructions made in England as to those Sts, are prima facie Law here

This y St of Frauds & is not prima facie binding here.

The power of devising depends then in England upon y St 32. Hen 8th explained by 34. Hen 8th. Ch. 5. The mode is prescribed by 29. Ch 2-

The first subject of consideration is y St 32. Hen 8th, a devise of y^s nature is called an irregular instrument, y only solemnity of y form wh it prescribes, is y^t it be ~~on paper~~ in writing - Hence any Testamentary devise of y^s Reality was a good devise, provided

such intent was not contrary to y Rules of Law - Doug 377 - to
9- Pow. 12-14. 48-

using y words, give, grant - &c -

An instrument then in y form of a deed, and actually delivered Proviso y
as such, may operate as a devise where y intent was manifest - instrument purpo.
But where an escrow is delivered as a deed in presente, to be to dispose of real
delivered on y death of y Grantor, it is not a devise - Ch. Ca 25 - state host y
8. 2 Kebl 310. Finch Re 195. 1. Mod 117 - 4 Day 66. - Testator's death -

vide etiam Supra ante

A devise may be written at different times, on different sheets
of paper, wh need not be connected & they shall constitute but
one devise - Thus suppose I make a devise today and another
of y same Estate tomorrow & they shall be his last will. Pow 17-
1. Show 545- 553- 1. Burr 548- Pow. 15-16- 682.3 -

Cumber. 174-

And one may make several separated dispositions of y same subject,
as to interest, estate, &c I devise lands to A and his heirs -
and by a subsequent writing he devises y same land to his wife for
life, both writings constitute one devise - y second is a revocation
of y first pro tanto, i.e. during y life of y Testator's Wife - as if he
had said to my wife for life - remainder in fee to A -

Cro El 721- 1. Bes. 187. Pow. 18. 19- 357- 540- 624- 27. 8- Cowp
87- 3 P~~Wms~~ 345. note- Cow 87- 537

And where there are two instruments, y latter may modify y former.
The last of two wills is to take effect. 2 atk 268- Pow. 17. 22 onwards -

and a devise referring to another instrument, makes y^t a pt of
itself, for y purpose of explaining y Testator's intention -

105 117- 2 atk 273- 1. P~~Wms~~ 530- 2 besⁱⁿ 229 Thus if I devise
to B all y rents expressed in a certain deed - So of a direction
by a Testator to an executor to dispose of a certain thing, as he
shd by deed appoint - & he makes y appointment - Pow. 22- 3 Mcnally 117-
2 atk 273- 1. P~~Wms~~ 530- 1. Pow 484- 2 bes In 225-

So after a devise or will is made and published, y Testator may make

a Codicil or codicils - explaining - altering - restraining, enlarging -
y disposition ante made Pow 24 -

The Law annexes y Codicil to y devise, and considers both as one
instrument Pow. 23. 543- 2 Bes 242- 1. Bes 187-
Mention of y will in y Codicil

is an annexation By a codicil is meant an appendage to a will or devise.
of y will to y explaining &c (ut Supra) A Codicil presupposes a previous will
Codicily - complete in itself and already executed. Root 26.7- ~~that~~

It seems then yt a Codicil always in strictness, relates in whole
or at least in part, to y same subject matter - as y original instrument
For a subsequent disposition of a distinct subject, seems rather a
Coordinate part of y disposing instrument, y n an appendage to it.
But a mere recital in a devise of something contained in ^{another} instrument,
is not itself a devise - Vent 56.7- St 427- Com 232-
87. B

In y construction of y St of Hen 8th, it was held, yt any devise
of land &c must be entirely in writing - Pow 25- Plow. 345-
But the Judge took y word writing in its most vague and
extensive sense, as in ^{including} loose notes - memorandums,
and even letters expressing y owner's intention - Pow 25.6
2 Bb 376- Mod 177- Tyer 72- Cro Eliz 100- Post 16-

Indeed twas held unnecessary yt y writing shd be made or
ratified by y deviser - A devise written by an Atty in pursuance
of instructions by y deviser, but in his absence and not even read
to him, was held good - Pow 26. Tyer 72- 2 Bb. 376. Cro Eliz 100-
1. Lear. 79- 113

3 Co. 31. 2 So it was held yt if any one in extremis, had by parol declared
his intent to devise, and another, without any direction, or authority
reduced it to writing in y former's lifetime, it wd be a good devise -
But these 2 last opinions were soon overruled - Pow. 26. Cro Eliz
106- Tyer 72- 2 Keble 345- 2 Lear. 113-

And it was held yt y devise must be completely reduced to writing,
during y deviser's lifetime, Tews twa be void - Thus if a devise
was to be made to S & S, and his heirs upon condition, and before

y condition was written, y devisor died, it was totally void -

Pow 28.9- Dyer 72. Co 31. B. " Henr 32.72 -

But where y devisor directed several distinct devises, and post one was completed, but before y others were written, died, y former was adjudged good - Pow 29.3 Co 31-

So it was held, yt a devise might be good in part and void in part, thus where a scrivener annexed a condition to y devise, wthout authority, y condition was void, tho y devise was good - Pow. 30-29-

Dyer 72. n. 2- 1. Heb 880 -

Secus where y direction was to write a devise on condition, and y devise was written wthout condition - Here y devise is not written in y Testator's lifetime - Pow 30-2 Heb 880 - according to his intention

Mod 256-

Signing by y devisor was held unnecessary under these Sts, Thus not necessary yt his name shd appear on y instrument Pow 30.1.1

Sid 362- 2 Leon 35.3 ibid 49- 1. Selwin 362-

Indeed thus held yt any writing, tho neither signed nor sealed and tho it were y hand of a 3^d person, with y evid of one witness was a devise satis established, - Pow 31- 2 Heb 128- 1. Sid Selwin 315- Pow 31-

A decision to y effect probably occasioned y clause relating to devises in y St of Landas- 29. Ch. 2-

It was olim held, yt contingent interests ^{resting} merely on possibilities, cd not be devised under y St- of wills, as a contingent remainder - Pow 34-3 Lev 427- quest by ~~Searne 291~~

Is now settled, yt they may be (ie possibilities) coupled with an interest, are devisable, before y instrument vests, ie: contingent remainders ^{interest} and executory devises - Thus a devise to a in fee, but if he die before 21. yrs - of age - to B in fee - B may devise his contingent interest, wh will take effect. if A dies - before 21-

Is Secus of a naked possibility ie. a contingency not coupled interest with an interest, thus a bare authority (not coupled with a ^{contingency} contingency,) ie. a contingent authority

where y estate of another is not devisable - Pow. 34. 334 - 496 -
600 - 1. Roll Re 222 - 1. Hen. Roll 330 - 1. Forb. 223 - 209 -
Fearn 441 - 4 - 3 T Re 88 - 90 - 4 T Re - 248²⁰³ -

Nothing
Nothing but an
interest can
be devised -

vide

But an Estate wh is twined to a mere right, is not
within y St of Hen 8th as a Reversion discontinued -
Thus suppose Tenant in Tail & reversioner join in a lease
for life, y Reversioner can't devise y reversion, tis dis-
continued - Pow. 35. 611 - Cro Ch. 281 - 293 - 387 - 405 - 3 -
2 Roll 198 -

Exe lands of wh y owner is disseised - Estates per auter vie
are not devisable under St of Hen 8th, for they are confined to persons
having land in fee simple - Pow. 36. 218 - 1. Roll 334 - Cro Eliz 58
Co Litt 41 - 2 Roll 156 Palm 38³⁸ 32 - 3 kelle 450 -

So of an Estate for several lives and for y same reason -
Pow 37 - 3 Kelle 456 - 1. ves. 428 -

So of a Freehold descendible per auter vie. Thus if Tenant
in Tail grant to a J his heirs - A can't devise his interest -
Pow 36. Lark 208. 311 - Popk. 91. 2 - Dy 253 -

But now by St 29 - Ch. 2^d estates "per auter vie" are ^{devisable} descendible
in there is a special occupant. I.e. in it is limited to y heir
of y original tenant - 2 Roll 259 - Pow 37. 8 - 40. Contr Roll. Ch n.

Devolution

Dignities, offices, and franchises, tho' they may be descendible in
England, are not devisable; they are not within y St of Hen
8th Pow. 10. 45 - 6. Wood 135 - But they may be surrendered
to y use of y Tenant's will, and may then pass by y surrender
to y uses named in y Will - Pow 45 - 40 - 3 Co 32. B. H. Co 81 -

So of Copy hold estates, they are not devisable in Eng - they are
not within y St of Hen 8th - Pow. 10. 45 - 6. 6. Wood. 135 -

The right of reentry in y lands depending on y non performance

on y non-performance of a condition by y Grantor, is not devisable
for y Grantor hasn't y land till y breach of y condition - Pow 46.183
1. Ves. 223. 442.

And y benefit of y condition is personal to y Grantor and
his heirs - so yt a devisee, as such, can't take y benefit of it.

2 Bb. C. 155.6. Pow. 46. See Estates upon Condition

1. M. & M.

The clause relating to y subject, in y Eng St. enacts yt all
devises of land, shall be in writing, and signed by y Party devising
or some other person in his presence, and by his express direction,
I subscribed in his presence by 3 or more respectable witnesses -

Pow 47.8. 2 Bb 376.

credible

The object of these provisions is to guard us from those
"in extremis" and to protect heirs at Law - 47. or 8.

All ^{devises} ~~etc~~ (no form being prescribed other ym St Hen 8th) - in
any writing wh ed have been good - as a devise under St Hen 8th
will now be valid, if y solemnity prescribed by y St of Frauds
are observed. i.e. signed and witnessed as y latter St requires -
Pow. 489.

Hence as under y St of Hen 8th, a devise executed kata
ys St, ^{may} be referred to another instrument, and make ys a part
of itself - tho' y instrument referred to, is not thus executed - thus
A by devise duly executed under y St. charges his land with
his legacies, and then by another instrument not thus executed, gives
legacies - these legacies will charge y land - Pow. 19. 48. onward.
2 atk 368-1. M. & M. 423. 2 atk 274. 3 Burr 1775.

"Lands and tenements" are y descriptive words of y subject matter, Colonists carry
upon wh y enacting pt is to operate - It was decided, y y St ^{with ym as much}
don't extend to such Eng Colonies, as were planted before y St ^{much} law, as was
was passed - Secus as to those settled post - Pow. 52. 2 P. M. extent, before
15. Corp 204. Salk 44. 1. Bb. 106. Kirby 369. Evi y y emigrated
Municipal Law - Tuckers Edit 380. 90-93. but our St. don't
confirm ym to, 1.
chook -

It's before Hen 8th are prima facie here etc -

yt

Same holds of
deeds of Real
Property.

But a devise made in a Foreign language or rather country
of lands laying here, must be executed kata our St, y subject
being local - y "lex rei sita" must govern y disposition. 2 P. Wms
291- Pow 57. 3-

It's secus in y case of personal property, wh in law has no
locality - and is ergo regulated by y law of y owner's domicile -
1. Hen Bl. R. 690- 25- 416- Lea ambler 35- 416-

The words above cited don't extend to Copylands - Pow. 114- 45-
553- 1. Hen Ch. 444- 44- 2 Hen Bl. R. 1114- 2 Bern 498-

Those are ergo not devisable - nor do they extend to y
request of a chattel interest - Bequests of y kind, remain in Gen
as at C Law - i.e. tis by y provision of y C Law. yt they are
devisable. Pow 55- Gilb 169. 70-
Eq R

1 Trust of inheritance is within y St and can't be devised
but by an instrument made according to it - Thus ex a devise
to a l of lands, held in Trust for him by B of an equity of
redemption - Pow 57- 3 alk 152. 2 P. Wms 256-

An appointment of land under a power, if made by will, must
be executed kata y St - Suppose an Estate is conveyed to Trustees,
to such uses - or in trust for such persons as A shall appoint - by
Pow 48. 58- 150. 1. P. Wms 740- 2 ibid 255- 2 Ves. 178. 9 ^{by will}

On y last Rule, by "will" is meant, such a will as is
proper for y disposing of Lands: y instrument, by wh A in such cases
directs y uses, or Trusts, is not called a Will or devise, tho'
of a Testamentary nature - but an appointment -

It's a gen Rule y a writing importing to be a will, if void as
such, for want of y prescribed requisites, can't operate as an appointment
Secus. y mischief to be prevented by y St, wd ensue - it being
as important to guard vs fraud in y case as any other -
Pow 58. 9- 2. Bern 597-

And if a legacy is originally given out of land, y will create y charge, must be created kata y St. - such a charge is to affect a disposition by devise - Pow 59- 2 alk 268- 285- ^{in the first}

This is differt from a legacy referred to in y devise - In y case y charge is created by y devise -

Rents arising out of lands are within y provisions of y St for they partaking of y nature of y land - and follow it as an Incident does its principal -

To a will giving powers to exec^{rs} to sell lands - must be executed kata y St, for y is directly disposing of y land - & enabling others to do it - Pow 59- 2 bes. 179-

The Eng St of Frauds extends in terms to all lands, and Tenants devisable either by y St of Wills or by itself y St of Fraud or by any custom - Pow 59-60-

Writing

Requisites

Of y solemnities required by y Eng St in devised - y first is, yt it be in writing - This requisite obtained under y St of Wills This rule needs no farther illustration, ym has already been given respecting y instrum^t under y St of Wills -

Second - it must be signed by y Testator, or by some one in his presence & by his express direction -

Sealing is usual in Comt, but not necessary here or in Eng -

Sealing in y case of deeds is a feudal solemnity - a mark of distinction between families - But y Sts relating to devised don't require it - Pow 61-76- Gilb R Evi 360-1- 1. Pow 326- Coups 264- ^{Gilb R Evi 261}

It has been held, yt Sealing alone amtes to Signing within y St - Pow 62- 3 Levi 1. 3 Med. 219- The Ct was divided -

3. to 1- The same point was held by La Rayond - 12. Sts 764- 450.

Pow 66-7- Twa's post held contra - 1. bes. Pm. 1345- Pow 71. bes 342-

67- 74- 1. Wills 313- The latter seems y better opinion - The former

facilitates y forging of devises - and as y law is now understood,
Sealing an't satis -

But y name of y Testator written by himself
written by himself in any pt of y instrumt, is construed a signing -
in it appears, t'wa's not so intended - Pow. 61. 6. 3 Lev. 186. 3
Mod 219 - 1. Eqty Cases, n. C. 403 - 18. Vry. Br 183.

But if it appear yt y name written in y body of y instrumt
wasnt intended as signing, twont operate as such - as if
there was an express intention to sign formally, and y intention
was defeated - Thus where y devise was in 5 sheets, y Testator
signed y 1st and tried to sign y others, but failed,
y Ct held. yt there was not satis signing within y Its -
Doug 249 - 1. 229 - 1. Fonth 180 - 3 V.

The onus probandi in these cases, lies upon y person, who opposes
y devise - The presumption of law (y intent to devise being certain)
is yt y name written 'ut Supra' in y body of y Instrumt, was
intended to be a signing - Pow 65. 6.

A devise subscribed by 3 witnesses, and declared by y Testator
in yr presence to be his & will, tho' not signed by him,
was held to be well executed. 1. Best. 11. Where want y Testator's
name written by himself in y body of y Instrumt - if not, how
can it be law?

Third. y devise must be attested and subscribed in his presence
by 3 or more credible witnesses - The gen object of y clause was
to prevent frauds concept upon y secret execution of devises -
1. Pow. 68. credible. 1. Burr. 477. Pow 113. 6.

The attesting witnesses are to attend to three things -
First. y Sanity of y Testator - 2^d the fact of signing -
Third y fact of publication Pow 80 - 67.

First they are to judge of his sanity, for y signing wh they are

to attest, includes in law, not only y physical act of writing - y testator's name - but also y mental power, or capacity of making a legal signature - An idiot may write his name - but can't make a legal signature Pow. 67. 71- 3. P. M. 13- 6 Biner 169. 13- 13-

And when y devise is offered for probate, y testator's sanity must be proved, tho' y onus lies on y devisee - Proving y execution to have been formal won't suffice - Pow. 69. 70- 2 alks 58- Bull 264- 1. B. B. 365-

Hence a Ct of Chy won't establish a will, ni all y attesting are examined, for y heir has a right to require proof of y Testator's sanity from each of ym Pow 70- 3 P. M. 13-

As to giving it in Evi at Law. see post-

But y testimony of y witnesses as to y testator's sanity, is not conclusive as to his signing - or even as to y own subscription - They may be contradicted in either of these points by y other witnesses - Bull 264- Pt 1096-

Secondly - They are to attest y fact of y Testator's signing; tis not necessary however, yt y witnesses shd have actually seen y Testator sign - An acknowledgment by him to ym, yt his name appearing on y Instrument was written by himself - is satis as to y point - Pow 71- 7. 8- 3 Lev 1- Prec Chy 184. - 2 P. M. 308- 2 bes. 456- 3. P. M. 453- Long. 432- or 244- and tis as usual to sign in y way as any -

But y Testator's saying, "yt is my will" is not satis Evi it seems of y fact of signing - for tis no acknowledgment of yt fact - y will may have been drawn wtht his seeing it - and yet he might have said so in confidence 2 alks. 182- Pow 75-

It seems. however, yt a written declaration in y handwriting of y devisor, yt his name was written by himself, is satis to a Jury of y fact of signing as Sign &c "as my last will" Pow 76- Skin 227 Com Re 197- Sed Quere. an an actual acknowledgment ant necessary - How can y written declaration be better Evi ym y Signature itself - Pow 80- 2 P. M. 254-

2.
Third

The third fact wh^y witnesses are expected to attest, is y^e Publication: as y^e was necessary before y^e St^o of Frauds, and as y^e St^o is silent on y^e subject, tis still held necessary - Pow 81-80-3 atts 156- This is required at C^o Law to y^e disposal of Personal property and of course of Real property - ed have been devised at all, it wd have been necessary in y^e case also - This requisite is tantamount to y^e delivery of a deed - Delivery has no effect on a Will - 3 atts 156- Pow. 80-1-

By a publication of a will, is meant some declaration of y^e Testator, or some act of his amounting to a declaration, y^t y^e Instrument is his will - No particular form of publication is prescribed - Pow 81- any act or declaration importing a solemn intent in y^e Testator to dispose of his Estate by y^e Instrument, is satis - Pow 81-2- 8. Brier. 125-

And hence y^e delivery of y^e will as an ^{or deed} escrow, into y^e hands of y^e depository, has been held a satis publication - So held, even where y^e witnesses ~~no~~ were deceived, and supposed y^e Instrument to have been a deed - Pow 81-2- 4 Bms Ecc Law 117-

Tis not necessary for y^e witnesses to know of what nature, y^e Instrument may be - tis often even desirable, they shd not know - The St^o is intended to guard y^e Testator ~~not~~ deception, and so long as he is not deceived, tis no matter about y^e witnesses -

So declaring to y^e witnesses, "y^e is my last will" is said to be a satis publication Pow. 82- & publication may be enforced, as where y^e form of y^e attestation was in y^e Testator's hand - writing & in these words - Signed - Sealed - ^{executed} published and declared - &c &c in presence of us - & he said to us, take notice This was held a satis publication Pow 82.6- 4. Burns Ecc Law. 114. or 17-

But y^e publication must be in y^e presence of 3 witnesses - y^e precise point has not been adjudicated, but it has been held in a republication not is y^e same thing - Pow. 644-64- Com R^o, 381-
20

It is essential to y validity of a devise, yt y whole instrument be present at y time of attestation - If it is on several pieces of paper, one of wh is attested by y witnesses, who never saw y other - y will is not attested in y proper manner - Pow 87- 3 Mod 260-3-3- 1 Eqty. Rs 403-

But ni there is positive proof, yt y whole wasn't present - y Jury may prove y circumstances of y case - presume its presence, tis a mere question of fact for yr consideration - Pow 87- 2 Burr. 1773- 1. Rb. R. 407. 22- 54-

As to y subscription of y witnesses, tis held, yt if devise is made on 3 sheets of paper. not joined - & each signs one sheet - y subscription is satis - All are supposed to be present, and it can be of no consequence, where y names are placed - 2 Rb. R. - Com. 377- 1. Burr. 548- 3 ibid 1775- Pre Chy 185- 8- 370- Carth. 37- Pow. 89- 161- 8- 682- 3 Mod 263-

Powel says, yt if y doose sheets all wrapped up in a blank paper, y subscription on yt, will be satis - Pow. 90- 682- 3-

This is an improper Rule: y blank paper is not part of y will - and they might as well subscribe on a box or chest containing it - It leads to uncertainty and imposition, as much as to y identity of y will -

The St prescribes, yt y witnesses shd subscribe in y presence of y Testator these words are liberally construed to mean within his possible view - Thus if they subscribe in y same room - & he turn his back. & also where he might have seen into a Gallery - through a Glass window or door -

So where he was in bed with y curtains drawn. & where y devisee (a lady) rode to y office of an Atty - and sat in y carriage with y windows down - Burrow. Chy 99- 2 Rb. R. 377- Path 329- 5- 688- Carth. R. 1. Eqty. Cs. 403- Doug 252- Pow. 98. onward -

This provision is intended not only to prevent fraud, as in subscribing a false instrument, but also to prevent mistake as to y identity -

as if y Testator shd have prepared 2 wills, he might have mistaken one for y other -

But y subscription tho' in a contiguous apartment - is not good -
 ni y Testator might have seen it - Pow 92.4 - Carth 79 -
 Comb 176 - 1. Show. 189 - Holt 222 - 1. P. M. 239 - Pow 98 -
 # 115

And if y witnesses shd retire to subscribe, tho' at y Testator's request, y subscription will not be valid - Pow. 94 - 2. Show - 288 -

By "presence" is meant mental, as well as bodily presence, y Testator must be sensible of what y witnesses are doing - at y time of attestation, y execution must be completed, while he is compos - Pow. 96 - Doug 229 - 41 - y

From these rules, tis clear, yt tho' y attestation is in y same room, with y Testator, & he be of disposing mind, yet if they subscribe clandestinely - or impose any impediment to his sight - tis not satis within y meaning of y St - Pow. 95 - 1. P. M. 740 -

Tho' y witnesses must subscribe in y Testator's presence, yet of fact need not appear on y face of y Instrument, tho' it is usually y common form being - "Signed, Sealed, and Published" in y presence of us, who subscribe in presence of y Testator -
 Tis a fact for y consideration of y Jury, and tho' stated in an instrument, must still be proved, ni y witnesses are dead - or where y Jury may presume it - Pow. 98.9 - Com. R. 531 -
 St. 1109 - Bull n. P. M. 264 - 8. Vin 128 -

By y Eng Law. y attestation must be by 3 or more credible witnesses, under these words, it has been decided, yt if a devise has been subscribed by A and B. and after a codicil by B. and C. y devise is not signed by 3 witnesses under y St -
 Pow. 100.110 - 680 - Carth 35 - Holt 742 - Cromb. 174 - 3 Mod 262 - P. Chy 270 -

And if a devise is not duly witnessed, a codicil with 3. witnesses

won't make it so - 2 Vern 597 - Pow. 680 -

It don't appear, ni in one of these cases - Cow. Re. 384 - Pow 104)
 yt y devise was present, when y codicil was executed -
 The decision appears plainly to have proceeded upon y distinction
 between a devise and codicil on y one hand, and a devise
 made at several times, and in several distinct parts on y other -

Pow. 138. 668 - 686 - Brown 454 1 Burr 554 - 5

In wh last case y attestation of one part (y rest not being
 present) is satis. The reason of y difference is, yt a codicil
 is considered as intended only to affect an instrument, already
 completed, not to consummate y instrument or to give it validity -
 its effect is merely to qualify, enlarge - or alter y original instrument -
 and hence y due attestation of y Codicil is not capable of giving
 validity to y original devise -

But an attestation of one part of y original devise is not intended
 to give authenticity to y whole - Pow. 681 - Prec Chy 270 - 2 Vern. 577 -

But where there is a will and Codicil on one piece of paper -
 y question ^{an} y subscription belongs to one or both, is a fact to be
 determined by y Jury - Pow. 106 - Com. B. 197 -

And to y question ^{as} ~~if~~ ^{writing} ~~subseqnt~~ ^{is} a codicil, or a distinct
 part of y original (and) devise - it seems yt if y subseqnt part
 relates to personality only, and is executed according to y St -
 y circumstances furnishes presumption - yt it was not intended as
 a Codicil, but a component pt of y will - y obtains only when
 y subseqnt part relates to Personality - only - 1. Burr 54. 5 - Pow. 109 -
 554 - 5 -

The reason is, yt y St requisite of subscription by 3 witnesses, was
 wholly unnecessary to y disposal of Personal property, & if it be so
 subscribed, it shall warrant y presumption, yt it was intended as
 as a part -

Is not necessary, yt y witnesses subscribe in each others presence,
 or at y same time: for y terms of y St don't require it -

Pow. 110. 2 Chy C. 109 - 3 Burr. 1775 - 2 Vern 429 - Bro Chy 184 - 2 d atts 177 -
 Prec.

But tis altogether y safest way, as will be shown in y mode of proving Wills, for scus neither can swear to y subscription of y others, wh might be done in an action at Law, and no answer y same purpose, as if all were present. Bull ^{no} 284 Pow 708- 1. P. Wms 741- 1. Foulk 184 1. Bb R 365- 4 Burr 2224-

But if one is living, y handwriting of y test ed not scus be proved - Pow. 709-

In such case, proof yt y others signed in y Testator's presence, can't be made by oath of one - nor perhaps expressly proved at all, ni all were together. Pow. 113-720-

Note y difference between y execution and attestation of y devise in a particular suit at Law, wh may be done by one witness: Pow. 708- 1. P. Wms 741- and y establishment or formal probate of it in Chy - for wh purpose all must be examined - Pow. 70. 718- 1. Mill 216- 1. Bes. 177- In Comt, y practice is, to call but one to prove it -

The Eng It requires, yt y witnesses be credible, y word is omitted in our It and is wholly unnecessary - if it mean competent, or word is implied in y word witness 1. Burr 417- Pow 133-

If it mean entitled to credit, it seems negatory; for y credibility of y witness is no part of y essence of y devise; nor at all necessary to its validity: it can never be ascertained till witnesses appear in It to swear; There credibility is never a subject of Enquiry ni to ascertain now, as their testimony is entitled to belief - Broom 417- 1. Burr 417-

It has been decided, yt a devise is not such, as y It intends by competent. He is already not so as to y property devised to him, being directly interested in y Event, for one who is a witness can't be a credible witness - Thus suppose a devise signed by A and B and C and A is interested, y devise will not be good as to him. His signature wont affect it as to any else - The Rule excludes interested witnesses generally - Pow 114. 16- Cow. Rep. 91- East 514- 2d Raym 505- 12 Mod 277- 12 1253-
mod

And a person regally infamous, is not a competent subscribing witness; for witnesses are intended to testify respecting it in a Ct. of Justice: But if he have been before convicted of felony - his attestation is void - 4 Burn Eccl Law. 93 - Pow 16, 136 -

But suppose one of 3 subscribing witnesses to be a devisee, and assuming yt he is for yt reason rendered incompetent - to testify in support of any part of y will, can a release given by him (or any ^{ex} post facto act) of his interest under y will, qualify him to testify in support of y other dispositions - In other words, if y witnesses, tho interested at y time of attestation, is competent to testify at y time of examination, can y devise be established?

Is it well attested? Pow. 113 - This is one of y greatest questions ever argued in Westminster Hall, and called forth more talent ym any one ^{yt of} Copy hold - It was held other by Lee Ch Jus - 18. yt y witnesses must be competent - 18 - disinterested at y time of attestation - 18 1253 - Pow. 116, 19 -

The witnesses wife had an annuity charged on y land, and not released, interest - subsisting - So in Hilliard vs Hennings - This case was carried to y exchequer chamber, where there was a difference of opinion and y case compromised - Pow. 120 - 1. Ves. 513 -

2d Raymond 595. Carthey 514. 12 Mod 277 - Comyns 91 -

The question was decided directly in favour of y devise under such circumstances in Bunham vs Thewood. - Burr 414 - 10 124 -

The witnesses were all creditors, y debts were charged on y land but paid before y examination - The devise was held to be fully attested - The same opinion was manifested by Ld Hardwick - in Price vs Lloyd - 1. Ves. 503 - 2. Ves. 374 - Pow 120 - The case of Ld Aylesbury is in point to y same purpose - 1. Brown 427 - Pow 135 - 6.

The witnesses all had legacies charged on y land by 2 wills, it was indifferent to ym at y testator's death (not before) wh ym was established - The same principle was decided in Rossy vs Kinsey - Pow. 130 - Ch Jus Contra - See Ch Jus. Prats argument - wh is false!

In Comt y case of Bradworth vs Camp was decided in favour
 of y devise by y Supreme Ct - Reversed by y Ct of Errors - 1779 -
 The weight of Eng authority is, yt y competency of y witnesses
 is restored by y release - Powell makes ym balance
 Pow. Dec. 133 - Mordham and Chetwin -

Answers also

As to y second question, tis a gen principle of y C L -
 yt a release of an interested witness restores his competency -
 Pow. 121 - Doug 134 - Id Ray 730 - Objection, there is a
 imputation to fraud at y time of attestation -

JG. thinks y will attested -

What then, there is y same objection to any case at C Law -
 The St of frauds is intended only to prescribe Rules of Evi in
 Ct - Objection, y practice furnishes bribes - So in every case -
 Objection, suppose. Idiots - Lunatics - infants, they cd not judge
 of y execution - Suppose y same at C Law - Objections. Suppose
 3 or 4 Englishmen required -

First y qualification is intelligible, as referring to attestation -
 but incompetent witnesses are not -

Second - If competency relates to y time of attestation, then a
 competent witness means only competent ^{eye} witness - One of capacity
 to judge and attest y execution of y Instrument - Not a competent
 disinterested witness at y time of testifying, y is absurd -

Third, tis questionable indeed by authorities, an y devised to y witness
 is not at void ab initio - So yt he might testify as to y others -
 without a release. 1 Burr 428 - 1 P Wms 557 - Carth 514 - Ho. 1253 -

Law not positively settled - decided Contra in Comt. Bradworth
 vs Camp. Ct of Errors 1779 -

The St 25. Geo 2^d provides yt devises and legacies to attesting
 witnesses shall be void, and they admitted to testify, and yt
 Creditors whose debts are charged on y Testator's land - and who are
 subscribing witnesses shall be admitted as witnesses to y execution
 of y will - Such charge tamen - Pow 122 - 3

The St. 25, Geo 2^d (being declaratory merely of y^e Law - is an authority in support of y^e opinion, yt a devise to a witness is absolutely void "ab initio" and yt ergo he is a competent witness wth a release See Evi 136 - Pow 122 - That it is declaratory - Pow. 129-33. 5 Bac. 516- (133 Pow) where he attempts to shew from y^e authority of y^e St, as a declaratory act, yt a devisee incompetent or interested at y^e time of attestation can't become competent by a release -

Because y^e St declares. yt he is not incompetent at y^e time of attestation - or rather yt a devisee is not competent under y^e St of Frauds - even after a release - (for yt is y^e present point under discussion) quia he is competent wth it - See Comnt St Little Devise Comnt St 1807...

But a devisee or legatee is a witness vs y^e will - for y^e is vs his own interest - Pow 135 - Talk 691 -

An Executor is
is good witness
Jag 134
Esp Dig 489
Gill Evi 120.
1 Mios 107
1 P. Mm 689
2 Bern 699
2 Bel 42
Str. 34 -
5. J. R. 372
2. East 183
12. do 250

And if a Legatee or devisee is indifferent an y^e will stands or not, as where he has y^e same legacy given him by a former will, to wh^{ch} he was not a witness, and wh^{ch} must be valid if y^e other ant, he is a competent witness to support it, ante 31 - 1. Burr. 427 Pow. 125 - Gill Evi 120.

Where there is a disposition of Real and Personal property in y^e same instrument, tho it is not executed kate y^e St, so as to pass y^e Real estate, it may yet be good as to y^e Personal property St 1255 - (East 514) 2 Bes Pn 200 - 319 or 143 27-3323 - Pow 118 - Tho void as to Real - 327-337 -

Who may Devise

The Rule seems to be under y^e St of Wills, yt all persons capable of conveying Real Estate at E. L. by deed, and who are not disqualified by express words of y^e St, may devise.

The words of y^e St, are - "all persons" but y^e term don't include corporations or bodies politic, but only natural persons, Corporations they may make Sole or aggregate can't devise under y^e St - 1. Roll 608 - Pow 139 -

And as to natural persons, there are four disqualification, These

Infancy is
completed
on end of y day
preceding y
anniversary
of yr birth-

indeed are all enumerated in y explanatory act of 34-5 Hen 8th
Infancy - Idioty - Minsane Memory and coverture are disqualifications
at Law - Those who before y Act could not convey lands during
yr lives, can't convey ym - Dyer 354, B - 1 ves. 300 - Pow 140-2 -
Post Perko 231-

A Person deaf, dumb, and blind has been held not competent,
to devise, for such persons were formerly presumed to want understanding.
Co Litt 42- 1. Bl. 304 - Pow 145-

However at y day a person deaf and dumb may devise,
provided it can be shown he has satis intelligence: for modern
experience has shown yt yg may have as much intelligence as others -
altho y presumption of Law. is still yt they are incapable. Co Litt
42. Pow 145- 1. Bl. 304 - Such a person may be punished -

It is not satis, then yt y testator can remember common events,
he must also have a disposing memory, i.e. understanding satis to make
a rational disposition of his property - 6 Co 23 - Pow. 146 - Dyer 72 -
D.

one who has
a glimmering
reason, is not
an Idiot

In idiot is one who has no understanding from his nativity i.e. a
natural fool - An Insane is one not wanting original understanding
but who has lost it from some supervenient cause - *Ides. Contracts*
Dyer 141. 1

What is a sane and disposing memory, is a Question of Law, to
be determined by y Ct, but ys being explained by y Ct, y Question
an it exists in a given instance is a question of fact to be left
to y Jury - 6 Co 23 - B. Powell 146 - Dyer 148. B-

On y case of coverture, y acts of y wife are considered, are considered
as done by y coercion of y husband, but ys is not y principal reason
of her disqualification. The Rule is founded on y legal unity and policy
of Law - Holt 95 - Day 354 - 4 Co 61 - Co Litt 112. B. Pow. 146 -
and it has been held in Eng. yt a local custom yt a wife may
devise is void, as being contrary to y policy of y law -

In y State, this decided many yrs since, yt y wife might devise -
But ys decision was overruled in another case by y Ct of Errors -
not held yt she could not devise - But in y year 1809 - a St. was
made

expressly enabling y wife to devise - This Rule however peculiar
to y^e State - Kirby 195- 2 Day 163- Post 136-

But even here y wife can't devise so as to deprive y husband
being Tenant by Curtesy, any more yn y husband cd by his will
deprive his wife of her right to dower, for y act of devising
is merely placing another in y place of y heir at Law -

But where y husband is banished for life, y wife may devise
her real property, for she is a *Femme Sole* and may act as such
in all things. 2 Vern 164- Pow. 148. y- no one can
trust himself
of his allegiance

Even in Eng there are modes in wh y wife may either obtain or
~~preserve~~ ^{secure} y same power over real property, as a *Femme Sole*. In
both cases, however, her act is in y nature of a declaration of Trust,
or an appointment - In legal Theory, she acts in such cases as an
agent executing an authority - Her act in either case is not
a disposing act in Law Hus et Wife 34.5-41.0- Pow. 149-

^{Consentory}
An Extry agreamt to make a settlement for either of these ~~cases~~
purposes, will be satis, tho y settlement is not actually made -
I. e. y heir will be compellable in Eqty to make an conveyance
in pursuance of her appointment - 2 TR 695- 6. B. P. C 195. or 6-
2 Ves 191- Pow 168-6-

First By way of Trust. Second - By way of a power Trusts and p use
were y same -
over an use

First By way of Trust - Thus if a woman while sole conveys
her estate to Trustees in trust for her separate use during
coverture and post in Trust for such persons, as she shall
by writing in y nature of a will appoint, In y case her devise or
appointment while coverture, is called a declaration of Trust, and
Ct of Eqty will carry yt into effect, so as to vest y Estate
in y appointees - 2 Ves. 612- 2 Pow. 162-50- 2 TR. 695-
3 Atk 707- 2 Eqty Cs 157- 753- Pow. 50-

The same thing may be effected by a fine or recovery post marriage

proviso her husband joins with her in y conveyance -

The same thing may be done by power over a use -

Thus if a feme sole being then under no legal disability conveys her Estate to A - B et C in trust for herself for life - and to her own separate use, if she post marry and then to y use of such persons, as she shall by any writing in y nature of a will appoint - A devise making y apptmt will be supported in Chy - So now supported in Cts of Law - it seems, for y It executes y use - Not so in y case of Trusts - 2 J & C 695 Pow 162. 150. 2 Ves. 612. 2 Ves 64 - 3 Atk 707 - 2 Eqly Cases 157. 63. Powell on Powers. 50.

But it must be kept continually in mind, yt y conveyance to Trustees is y disposing act, and yt y naming y persons, is merely executing a naked authority, wh a feme covert may always do, if of full age - The execution of y power must be according to y It of Fraud - Pow. 489 - 58-150 - ante 14.

Husbands and Wives

Page 14.

An Infant
can never
exercise any
general power,

A feme covert while an infant can't execute such power - for it is considered as a general discretionary power, and an infant is supposed to want discretion - 3 Atk 897 -

1. Ves. 298 - Pow. P. 437 - 3 Atk 695 - 710 - 7. 14. 15.

Co Litt 52. a -

897

714-715-

Restraint, duress and menace of imprisonment disqualifies any person to devise property - In short, an coercion used to extort a devise, will make yt devise invalid - This is y Rule at C Law - Royd 334 - Pow. 170 - 2yer 143. B -

Tis said by Powel, yt it is implied by y words "free will and pleasure," in y It - witht such words, y devise wd be void -

It has been said, indeed, where a man has been induced by excessive importunity to make a will, y will was void, as being a species of Restraint - Pow. 107 - Stiles 427 - 1. Chy Re. 661 - 170 - Stiles

vide Comyn Dig. § 1. where y Rule seems to be contradicted - Tis at least a very vague Rule, and to avoid a devise on

on y^s. ground. y case must be a very clear and strong one -

If either of these disabilities exist at y inception of y devise,
 i.e. at its execution, y devise will be void, tho' y disability the inception
 shd be removed before its consummation by y death of y Testator supports or
 for y consummation has relation to y inception, wh is void - destroys
 Roll 246 Pow 172.3 - 11 Mod. 157 - Royd 84 - Palk 238 - y consummation
 Cam 84 - Ante 11 - Hus et Mife 95 - So the inception supports or
 Cumberb (753) destroys y consummation

Tenant, A jointenant can't devise in England, y^s nearly
 rule as to devises by custom before y 8 Hen 8th for y Survivor claim
 y whole by title paramount. He claims by death of his companion -

The Devisee loses his death - "Per et Post" Litt Rec. 2.78 -

Co Litt 185. a. Perks. sec. 500 Pow 175.6.218 -

The same rule holds under y 8 Hen 8th - They are not expressly
 disqualified under these Sts. but tacitly by 34 Hen 8th wh expressly
 empowers persons seized in Severalty. Coparcenary and Common -

Expressio unius est exclusio alterius -

And there can't be a joint devise: for St Tenants can't
 devise at all - They are not within y St. and other Tenants Cow. 269 -
 have not a joint Estate. Co 269 - So if a St Tenant make
 a devise of his part, and survive his companion, I ^{then} dies - Lit 1. Egly Co 172
 void "ab initio" He had nothing then wh he co devise - Perks. Sec. 501
 1. Egly Co 172
 1. Bb. 476 - Sec 501
 3 Burr. 1488 - 1. Bb. 476 - Sec 501
 3 Co 81 - 1. Bb. 476 - Sec 501

If however one St Tenant having survived his Cotenant, then makes
 a devise, it is good, for he is then seized in Severalty -

General Rule - a man can't devise lands, wh he hasn't,
 or is not seized of at y inception of y devise. i.e. y time of its
 execution and publication - This indeed is y C Law rule as applicable
 to devises by Custom -

As a Testator devises all his lands and purchases more, y latter
 don't pass -

A Devise is in nature of a conveyance "in presenti" It takes effect ^{401.} ^{400.1.}
 "in futuro". Hence in general one can't give by devise, what he cd ^{193.} ^{193.}
 not convey by deed - This don't relate to Personals - Co Litt 111. Roll 246 -
 759-750
 C 11
 750

The owner then must have a present interest. Even a livery is dispensed with, only from necessity. Ante 11. Post 45-187.8- (Pow 185.95-) some opinions are opposed to y^e rule, but they are not considered as law. Pow 185-

Tecus as to an after purchased lease for yrs- y^e being only a chattel-

For a will of Personality is not considered at C Law, as a gift of a Specific thing, but as y appointment of an heir to one's Personal Estate -

Disseisin. So in devises by custom, it's necessary y^t y devisor who die seized, for y conveyance is not considered consummated till y testator's death - ergo if y owner of land post devising it, is disseised, and continues so till his death, y devise is void - for y estate is connected to (with) a right wh^{ch} is in nature of a cause of action (ante 11) and ergo co not be conveyed by deed ante 353. Pow. 184.6: 566. 611- 1. Modg 217-

2. 290. C. Litt 48. B. 214. 390- Plowd. 341- Holt 250-51. 2-243- Secus of a disseisin for by fraud and covin for y purpose of defeating a devise, y devise is good in Chy - The same Rules obtain under y St Hen 8th. 1 Equity C 174 1. Roll 378. Pow. 611-

But if y owner being disseised post y devise is made, re-enters and dies seized: y devise is good. For he is considered as having been seized continually, being actually ⁱⁿ at y inception and consummation of y devise. Salk 238: 11. Co 51. a. B- Palmer 205-

Pow 185.6- Holt 248-

So if y owner is ^{as} seized at y time of making y devise, and post enters, and continues seized till his death, y devise is good. For he is supposed to have been seized ab initio - He is seized by relation - Salk 238. Pow. 185.6- 2 Bac. Abr. 52- devise B-

It has been very much doubted an a devise of lands not owned by y devisor at y time, but specially ^{lastly} described and post purchased, is good - Decided not to be - (contra opinions) Plow. 344- Co. or Holt 251. 253- within y same reason as if not so described - 243. La Raym^d 438 4 PR. 406- 3 Burr 1388- and arguendo-

His intention however clear, to devise y after purchased land -
can't be effected consistently with y Rules of Law -

Upon y same principle a devise by y mortgagee of lands mortgaged,
will not pass y Eqty of redemption - Post purchased by him -
Pow 212 - 3d Chy R. 99 -

In Connt actual seisin by y devisor ant necessary, having
or seised" is not used in y Connt It - Ownership is satis,
in descent by C Law - 3 Day 168 -

Right of possession, then is equivalent, for most purposes,
to actual possession -

Estate Due Trust - and in England, a person having an
equitable estate in lands, i.e. a claim to ym in Equity only - In d Ct of Law
may in Equity devise y lands - As Executory agreements by A to y legal title
sell land to B - before conveyance B devises ym, and dies must prevail
tis good in Equity - ⁴³⁷ For Equity ~~done~~ "considers as done, what ought to be
2 P Wms 631. 13es 484 - 3 Mod 78. Pre Chy 320. 2 Vern 79 - Pow 203. 5. 7 -
done"

For y venditor is a Trustee in Equity for y vendee, and on a bill
by y latter, y Ct wd decree a specific performance - This ant
treated as a devise of future Estate - The land belongs to
y vendee from y agreement in Equity - Post 53 -

But y land will not pass by a devise executed before
y executory agreement is made - Ante 45 - The devisor has
no personal interest in Equity - Pow 212 - 2 P Wms 629 -

Secus it is said by Ld Chancellor, if y devise were
for y payment of debts - But it was an obiter opinion -

Pow 215 -

Things devisable under St Hen. 8th - i.e. P. 9. 11 -

First. as y subject matter, all lands not devisable - by custom, are
devisable under y Sts Pow 200 - 29.

"All lands" here denote y subject matter, not y tenants estates for all
states are not devisable, tho' all lands are, if y tenant has a devisable interest
in ym - ante 9. 11 -

Tenements & hereditaments not valuable, are not devisable under y
Sts, as personal premises, may be - This rule is founded on y rules
Franchises.

in y words "of annual value" in y St Hen 8th
 Infra. ante.

Ways are not devisable in Comt - Could suppose, being not
 estates, but mere easements. "Lands and other estates" are y words in

Pow. 41. 5- 220. 7- in y Com St - Cro Elvi 359. 3 Co 22. B- 10. Co 81-
 45. 227-

Things incorporeal - But rents are devisable under y St Hen 8th

3 Co 33. B. Pow. 226. 14. if y owner has a devisable interest in ym - Litt Sec. 5. 85-
 3 of a advowson, they being valuable -

An annuity in fee is also devisable - It is different from a
 rent in y, y it is a yearly sum charged on y person of y
 Grantor Pow 229- C Litt 144- rent is always charge on land -

Second - & Estates, i.e. what interests y devisor must have
 in y thing to be devised under y St Hen 8th

In England, no other ym y Tenant in fee simple can devise
 under y St Hen 8th - The words "Estates of inheritance" in y 32.
 Hen 8th being declared by 34 Hen 8th to include estates
 in fee simple only ante 2- 2 Bl. 347- The words, Fee simple
 being used in y most comprehensive, sense, as a reversion,
 remainder vested, 3 Buls. 184- Also now contingent and
 executory devises Pow 218- 229-

Chattel interests are devisable at C Law, as terms for yrs -
 (ante 2.) No provision as to fee simple interest, is therefore
 made by y St of wills -

There are several estates of inheritance in lands called
 Pow 230. 32. 37. in fee simple - Fee simple absolute, 2^d Fee simple determinable,
 1 Res. 180 3^d 3^d Base Fee, Fourth Conditioned - Pow 320. 27. Plow 55.
 1. B. Chy 1 or 2 Bl. 109. 10 - To Fee conditional have succeeded fee tail -
 326- Note - a man may have a fee conditional in personal hereditament

Since y St de donis, fees conditional are confined to personal
 hereditament - As an annuity descendible to Lineal heirs only -
 Pow 320. 7. 9- 1. Res. 180-

All these are devisable by y St Hen 8th - Fee simple is used
 in its most general sense, as distinguished from Estates Tail and

225
estates per autem - Pow 232.3- ³ Buls. 184-

So estates in Fee simple may be in possession, or not in possession ^{1st expectancy.}
as to y former there has been no contrary of opinion - they
have always been held devisable Pow 232.5-

Fee simple not in possession may be devised, first into Reversions.
2^d vested remainders, Executory Devises - & Estates subject and contingent
to a condition of Reentry - Pow 232.4 - Flow. 154 - - joint remainders -

These estates are all devisable, except y benefit of y condition of - y estate itself
y last - Pow 233.4. 2. Bk. 184- is devisable -

Sho olim held y third class was not - Pow 34. 600 - 2 Bk 222 -

1. Hen Bk. 33- Cro Ch. 281-293. or 391-87- 405- ante 9. 11-

See of estates in possession 28-

As to a devise of reversions Vide Pows 234. 10 Bk 178-2
2 Ber 621- 2 Bent 285- ante 9-

A Reversion in fee expectant, even an Estate Tail is devisable
under y St of Hen 8th Pow 235- 10 Bk 81- Pol 313-

So a remainder expectant, or an estate Tail is devisable -

Pow 235- 1 Roll 609- Co Litt 111- Indeed y is a remainder
2 Woodw. 181- C. 4. 5- 192- Holt 30- 1. Salk 232- 3 AB
488- 9. n. Estates in possession 20 14-

Estates in Fee simple may be equitable or legal - Both are
devisable under St of Hen 8th as an equity of redemption
Pow 109- 2 Burr. 47-8-

So if an Estate is granted to A in Trust for B and
his heirs - A may devise it like uses. before y St 27. Hen 8th
Pow 205-6 1. Leon 257- 1. ante 48-

Third. What Estates created by Devises?

A Tenant in fee simple absolute may devise an absolute Fee simple -
and of course any other fee simple, wh can be created in y subject
by act of y party - 3 Leon 216- Pow 237-

So one having an absolute ^{expectancy} fee simple in possession, remainder, or reversion, may by devise, create a fee tail, or any less estate, as for life, per autre vie or for yrs - 10- Co 78. Pow 238- 240. 43- Co Litt 111- 1. Roll 69- 54-

But a devise of a fee after or upon fee is not good -
As to A in fee & if he die without heirs to B. in fee -

But this rule however relates to devises, considered as dispositive - "in presents" not as executory devises - By these y rule is now greatly modified

But y case stated by way of example may be void by way of executory devise, y contingency being too remote, see estates in possession - is its remainder created by devise and executory devises - see estates in possession -

So a tenant in fee may devise to one for his life, or per autre vie - The reversion in these cases descends to y heirs of y devisor -

So a tenant in fee after having devised for life, yrs. in tail, may devise other interests out of y estate remaining to him - I.E. out of y reversion till his whole fee is completely exhausted - The latter to take effect upon y expiration of y former - as to A for his life - then to B in tail - then to C. in fee.

2 Feble, 29. 55. 84 Pow 241- Plow 36-

And a limitation of y residuary estate remaining in y devisors - (ut Supra) may be either by way of remainder or by devise of y reversion - see estates in possession -

So a term for yrs may be created by devise - "de novo" Can a term for yrs be so created out of lands "de novo". at C Law 5

Estates created by devise may be absolute or conditional - as to A for life generally, or to A for life, he paying a certain rent to y the heirs -

And these conditions may be precedent or subsequent. Pow. 246- See estates on condition - Dyer 126. B. 348. Pow 245. 6-

There are no set technical words necessary to distinguish yrs & species of conditions - Every condition is to be construed, as

precedent or subsequent to the apparent intention of the deviser

But a condition describing a disqualification of the devisee to take, is in its nature precedent. As to a proviso she marry with the consent of the testator's executor. Marriage with the consent is a condition precedent.

But a devise to A and his heirs upon condition that in 3 mths post the testator's death, he execute a release of all demands to B, is subsequent. This is a devise of present interest tho' devisable - defeasible -

Estates created by devise may be either legal or equitable - ante 53 - A devise of lands when the deviser has a legal estate. No use of any one. Pow 270.1 - For the executor executes the use, i.e. transfers the legal estate to it - ante 2 - 2 B.C. 375. Pow 8. 236. 70, 78 - Estates -

5 Modes -

Uses and Trusts - But a devise of a use before the Statute of Uses was of an equitable estate only - as at the day is a devise of a trust - an equitable estate is where one has a use or beneficial interest, yet another has the legal title - Pow 51 - or 58 -

Property is said to be holden in trust, when the legal title is vested in one, in trust for another.

Uses were devisable at Common Law before the Statute of Uses. ante 1 - interest, yet another has the legal title -

If land is devised to one, no use being limited upon it - it can't be averred to be for the use of any other - yet the devisee - for the use would be contrary to the intent upon the face of the instrument -

Deeds 18 -

But now if a use is devised, it will enure to the devisee's use and will be executed by the Statute of Uses -

If land is devised to A and his heirs, to the use of A for life only - the use of the fee is in the devisee's heir -

So an equitable Estate may be devised through the medium of a Trust, as if lands are devised to A and his heirs - in trust, to pay over the profits to B - Here the equitable or beneficial interest

interest is vested in B. Indeed, such uses as are not executed by y^e It, are now called Trusts. Pow 285-

As to y^e origin of Trusts see Bb. 2. vol. 385-6- Pow 283-9-

Pow 282- The difference between an use and trust is, y^t y^e former since y^e It of uses carries y^e legal Estate. The latter don't - ante 2 -
For y^e distinction between Trusts executed & executory, vide -

When y^e Trustees are directed in y^e testam^t, creating y^e trust, to execute a conveyance of y^e legal Estate, t^{is} executory -

When no further conveyance is directed, t^{is} executed -

But y^e executed Trust don't include y^e legal Estate -

it is still an equitable interest - A decree for y^e conveyance of y^e legal Estate, is as necessary in y^e one case as y^e other -
Ibid -

Sd Hardwick says, "all trusts are in y^e nature executory."

Powers - One may create by devise, not only devisable interests, but an authority over such interests - Ad. Devise y^t P^r shall have (y^e disposing or devising, letting - & ordering of y^e Testator's lands -

Such a devise however gives y^e devisee a power to manage y^e land as he pleases - and to lease it at will, not to sell or lease for yrs - for he has no interest - Ante 14. 40 -

Cro Eliz 678. 341 - Yelver 373 - Pow 289-290-92 -

Co Litt 113 -
1. Roll 335 -

But if one devise y^t his executors shall sell his lands or orders y^t his land shall be sold by him or y^m or appoints, constitute, and empowers y^m to sell, they have authority to sell -

Devise, if my personal Estate is insuff^t - I devise my land to A and B as trustees to sell for y^e payment of debts - and all y^e residue of Real Estate to A. if y^e personal Estate is satisfied A takes all y^e real Estate station -

Naked authorities and those coupled with an interest
Authorities devised over lands are of 2 kinds First Naked Authority - 2. Coupled with an interest -

Powers were unknown at C Law - before y^e It of uses. 27. Hen 8th.
They were recognized in Chy only - Modifications of uses -

First. a naked authority, is a bare power to sell - see -
no interest being devised, as in y last examples *Supra* -

Pow 290.92.93 - Co Litt 236.

In these cases, y freehold descends to y heir, till y heir sale - till y power is execute
and a release of such authority by y person empowered, is void -
As an Executor empowered to sell, releases to y heir - The release
passes no interest, for y Executor has none - Co Litt 446.

Pow 290.3.94 -

Such an authority must be strictly persued, and y execution of y
power, ergo, must be construed with reference to y power itself - 1. Nils 176.

2 Ves. 644 - Coups 267. 2 LR 241. 2 East 376 - 1. Burr 120 -

So y authority is strictly personal, not transferable, being founded *vide sup*
on personal confidence, of course, y person to whom it is given, *supra* 45 -
can't devise it - If there are 2. and 1. dies, y other can't
execute it - So even tho both are executors, for they take not
as Executors, but as trustees - 1

If course y power don't survive to y executor of y original
executor - in y last case - Dyer 177 - Pow 294.5. 1 Root 67

So if y devise is, yt his land shall be sold by his executor -
or y executors of his executors - and y surviving executor appoints
executors, and dies - they can't sell for they are not executor
As both y original 1 executor - Cro Elvi 524.76 - Co Litt 113. a -

Pow. 296.7 -

But a sale under y power satisfying y words of y devise - will
be good in ys respect - As. One appoints 3 executors and devises
y lands to be sold by his executors - If one dies, a sale by
y other two, is good -

If y Testator devises, yt his land shall be sold, with naming
y person by whom ^{y sale shall be made} - his executors are y proper persons to sell
it. if they are to distribute or administer y avails - as to pay
debts -

1. Nils 420.

And in ys case, y surviving executor may sell alone, for 1. Levin 30 -
they take as executors "virtute officii" 2 Leon 220 - 1. Levin 30. 1. alkes 420 -
Upon y same principle, it seems, upon wh y executors of y executors might sell
might sell.

2. ² Leon 220 - The executorship being deemed an office and between y executor
Powel 298-9-307- as such, y right of action in y office, survives to y ^{surviving} Executor
This principle of survivorship holds also as between Co. adms -

Where 2. ^{persons} persons receive But if y Executor have no concern with y avails of y Sale,
private authority y heir is y person to sell. IE. if y avails are not assets
death of one in y hands of y Executor - y heir is y person to sell.
disposes it from 1. Atk 420. 1. Levin 304. P. Powel 299-307-

6th - If y person thus empowered to sell, refuses to do it -
A person ant those for whose benefit y sale was intended, may in
bound to accept Chy compel him to sell - If y person shd die, y Ct of
a Trust. Chy wd appoint a Trustee - Semble

Generally they cant be compelled,
Second - Powers coupled with an interest

Co Lite 36. a . Thus if one devises his land to y executor to sell,
265. Pow 301- or any other person to sell,
302.
304-

So if one devises y profits of lands to A, till y testator
son becomes of age, for y purpose of educating his son, for
ys is using y profits - 3 Leon 78. Pow. 301-

and in these cases, y devisee and not y ^{heir} estate will
2 Leon. 221 hold y estate, till y expiration of y term - and if he die, his
Cro Elvi 252 representative will succeed to the same power, and subject
Hobert 285 to y same duties - His y interest, yt is deemed y principal
Co Lite 112- and y power is y incident - This is denied in C. R.
113-
Leon 181-
221. Pow. 302-

And y state of devisee will continue, tho y object of
y devise is accomplished, till y expiration of y term -

as in y case above, y son died before 21 - yet y devisee
held just as long as he wd, had y child lived till 21. yrs
Thus y power follows y interest - Carth R.

Dyer 210.
Power 202

In a naked authority, y reverse holds - for there
is no interest, but only y management of y Estate, till y heir be maj

or to express it better, The Rule is such as to make authorities -
They are only incidentally to the Trust, to which they are annexed and
ergo expire with it - as a devise by the Executor or Adm^r, shall have
the management of the Testator's land, till his son attains full age to educate
him, & son dies under age, the authority and those facts cease,
on the son's death -

Under a limitation to such a child or children of A. as B shall
appoint, an exclusive appointment of ~~the~~ one of M's children, is a good
execution of the power.

A Power to appoint by devise is not executed by a mere residuary
devise. As A having a legal estate in Trust with a power to devise
to either of his sons, devises all his Estate to his son B post payment
of debts. The Trust estate doesn't pass, no intent to pass, appears.
no allusion to the power or Trust estate.

The inference is, yet he intended to pass only his own proper-estate,
such as he might charge with his debt.

An appointment by will is no execution of a power to appoint
by deed - Cowp 260 -

Who make or rather take by devise -

In general all persons not incapacitated by ~~devise~~ positive
law, may be devisees - Under 7. St 32. Hen. 8th

as explained by 34th & Hen 8th - Devises in mortmain are 1. R. 6. 479. 2.
not allowed. 18. devises to corporations or bodies politic - The St. Pow 314 - Hobs
43. Eliz. authorises by way of exception devise to corporations ¹³⁶
for charitable uses - but the exception is much narrowed by St 9. Geo 2 -

In Comm^{on} corporations are not incapacitated by any general law.
to take by devise - Here then all corporations which can purchase
and hold lands, may in general be devisees, except so far as they
are prohibited by their own incorporation -

Devisees then, may be natural or civil persons, in so far
as the latter are disqualified in Eng^{land} by the above St., or by their charters, or

or acts of incorporation Pow 315.

First natural persons capable of taking by devise, may be either in esse or not in esse, i.e. born or not born at y time of y devisors death - Pow 315-

First, Those in esse may be devisees unless prevented by some civil disqualification-

Coverture is no disability to take by devise - The husband may indeed at Law defeat y ~~act~~ devise, by disagreeing to it. But Chy will interpose to prevent his injuring y wife -

Perks 434. Pow 315-

So y wife may be devisee to y husband, tho' she can't be grantee, for a devise don't take effect, till his death, at wch time y legal union of y parties ceases - 1. Poll 610 - Pow 315. 16-

Co Litt 112. B.

1. Eqty C 173.
Co Litt 112. B
Holt 241-
Hill 241.

2 Ves 360
9 Co 141-
4 Leon. 84-
Pow 316. 18-

An alien ^{friend} may take as devisee but he can't hold, only till office found, seais called inquest of office - The estate then vests in y king - Here in y State - vide title by deed. 14-

3 Ab 258 - 9. as to office found - Tis an inquest or verdict of a particular kind finding some fact, as in y case of fact of alienage -

An illegitimate child can't be a devisee, till he has acquired a name by reputation, but he may then take by yt name -

as devise to y sons of A is not good, he being a bastard -

Co Litt 3. B.

Perks. Sec. 26-

Nov. 35-

6 Co 69. 1. atts 410-

till he has acquired y reputation of being A's son and devisee to A. B. he having acquired yt name, tho' a bastard - is good -

Nov 35- Pow
Nov 35- (344-

But if a devise is made to "y children of A" his legitimate will exclude his unlawful children, "Semple" for y former only are regarded as his lawful children, or as legally his, and y words are satisfied by adjudging y whole to ym - a bastard is nullius filius -

Co Litt

Litt 123. B.

an if such a devise is made by y mother of y bastard, tis y same - Dyer 345- Pow 345-

Second, as to natural Persons not in Esse, as children in ventre
sa. mera at y devisors death. Parent and child both Estates
in possession 23-

A distinction was olim taken between a devise ^{of present interest} to an ventre
sa. mera and devise by way of remainder - The latter was held good,
if y infant was born when y particular estate determined - Secus - not -
Pow 320, 21 Salk 228

But if y devise was immediate, and y devisee not born at y Testator's
death, it wd not take effect, because y freehold it was supposed
wd be in abeyance, till y devisee's birth -

But now by St 10. S. 11. Will^{en} 3^d if an estate is limited to one
for life, with a contingent remainder to his unborn child, &
posthumous child shall take, as if born in y father's lifetime - He
is regarded as in being for y^s purpose at his father's death -

Sed Quere on y^s St extends to devises. Salk 225 - it seems
not in terms, y words being by any marriage or other settlement -

3 Bae infancy and age -

So a distinction has been taken between a devise to such a child,
per verba in presenti, and a devise to such a one per verba
de futuro - In y latter case, tis well settled yt y person may take
18. As an unborn child, when it shall be born -

5 TR. 650-50-51. Term 429 -

The latter is good by way of executory devise and y freehold
descends to y heir in y meantime -

The last distinction don't contemplate remainders, but direct
or rather immediate devises to infants in ventre sa. mera -
without any particular estate preceding -

So under a devise to such children, as I shall have living at
his death, a posthumous child will take. 5 TR. dig. do

1. BPR and Salk 243 -

But an a devise to an unborn infant per verba "de presenti",
is good, being unborn at y time of y devisors death, is not kata Pow 322. 32 -
32

Pow 322.32- settled in England as I devise to y eldest son of A B, he having
 Raym^d 83- no son born at y time of y devisors death - Here y words don't
 Falk 230- import a future or executory disposition, as they do in y former
 1. Lev 135-156, dispositions or cases - but are in y common form of an immediate
 1. Mils 105- devise to take effect at y Testator's death - The opinions are
 2 Mod 8.9- contradictory - The weight of authority in favour of y
 Seame - 428, devise - 4. Burr. 2157- 1. Bb R. 653 - 2 Mils 225-
 Doug 476-
 Seame 428-
 Pow 330-
 Seame 428.

The objection to y infants taking in such case, is yt as he has
 no capacity to take, when y will takes effect, y freehold must
 be in abeyance, till he is born. if he takes at all -

But why don't y objection, if it amt to any thing, hold in y case
 of an executory devise to such an infant, wh is clearly good -

But y ground of y objection itself fails, for it is now fully
 settled, yt where a valid devise is made to an unborn child,
 y freehold descends to y heir of y devisor, till y infant is born -

2 Mod 233. 5 TR. 57- Co Litt 11. B. note 4- 3 Mils 525-

And y heir is not accountable for intermediate profits vide Estates
 in possession 8.14-

At any rate, if there are caprese words used, or facts adjoined
 in y devise affording an inference yt y testator was aware of y
 devisees incapacity to take immediately, he shall take as by a
 future devise as to y unborn child of A. when he shall be born -

So if a child be born to P. I. I devise to him as heir.

Authorities below scratched out, belong here -

4 Burr 2171- according to y more modern and better opinion, every devise
 Falk 230- to an unborn child, described as such in y devise, does afford
 Seame 428- such an inference, for y intent is clear, yt y limitation shall
 1. P. Mils 486- take effect on y future birth of such a child - So yt y disposition
 Mils 105- 17 Mils 105. is intended as executory -

~~Falk 14- 1. Lev 135- 1 Eq C. 173- 1 Bb 752. Falk 229-30~~

The question stated ante 40. to be unsettled, seems now then
 to be nearly at least, if not at rest -

If a devise is to an infant in ventre sa mere with a con-
 ditional limitation over and no child is born, y limitation over

235
takes effect vide Contingt remainders -

Second Civil Persons may be devisees, as executors, or administrators,
as Devise to y Executor or administrator - if D.G. is good - Pow 336.7-

So civil persons not in issue if y intention is clear, as to y Eod of
D.G. ^{executors}

But parishioners of a parish are not such civil persons, as can
take in y character - They are not ^{as} individual parishers, a corporation,
but evidently intended as such -

Pow 609.336. 1 Roll 614

But a parish. if a corporation, may take in its corporate
capacity -

Nor by Cont Law. can a church meaning y body of communicants
~~non-corporate~~, take as such, for y same reason - The law regards a church
as a church as a voluntary association - C 11

Description of Devises ^{ees}

Every devise must be properly designated or he can't take.
The ~~description~~ ^{designation} may be either by naming or describing him -
And tho' his name be mistaken, still if he is satis designated by
description, he may take - Title by deed 35

2. PR 671 - Co Lm 3-a 11. Co 21. a

Not so if y whole name applies to some other person - 8 Co 73. a -
So to y son of such an one, if has but one son - Pow 340 -

This position requires to be taken with qualification, for under certain
restrictions parol Evi may be allowed to explain y ambiguity -

vide Evi

The rule supposes no explanatory parol evi offered -

Bastard - and y description tho' not strictly applicable
may be good by reputation - To A y son of D.G. A being a Bastard -
In y case if he acquired y reputation of being y son of D.G.
he may take - 1. Atkes 410 - Pow 338 -

But y Rule don't hold in favour of a bastard born post a
devise made, for he must be capable of taking by such a description, if at all

by being reputed y son of P.G. but he can't gain y reputation of being y child, but by a continuance of time, i.e. lapse of time post y devise made in y case supposed -
 Co Eliz 509. 5 Co 65-10
 Oppens 525- Besides y future birth of such a child, is potentia remota -
 Co Litt 123 B. vide Estates in possession § 11-

Co Litt
 " Litt 530-
 Pow 339-

Hence also a devise to all y natural children of A, wd not enure to y benefit in ventre sa mere, for those unborn are not his children by reputation, and y possibility yt he may have unlawful children, is too remote -

A woman may take by devise under description of wife of A - if she is y reputed wife of A, tho she be not his lawful wife -
 See 25-

So a devise may be constituted by an equivocal or inaccurate designation - As under a devise Seniori puero of y devisee, a daughter may take, if such appears to have been y intent, tho prima facie y words designate a son & and a son wd take under y description to y exclusion of an elder daughter -

So a daughter may take under y description proximo sanguinis of y devisee, tho y adjective is masculine, as if there is no son. For y adjective as applied to a Son is only a verbal inaccuracy -
 Hobart 32. Co Litt 10. B. 2 Rb R. 102. 15-

So y eldest daughter in y last case excludes y younger -
 The word child or children is a satis description, as to a for life and post his children - His children take a life estate in remainder - descriptio personarum - y word child being descriptio personae -
 6. Co 17. a Pow 344-

The word children, is generally used as a descriptio personarum - or a word of description, in wch case y persons described take as purchasers - as last Case

So if an estate is devised to A, and his children, he then having children, he and they take a joint estate as purchasers -

Real property. 20- or wh is y same thing a word of purchase
as contra distinguished from words of limitation or inheritance

Parol Evi is allowed to show. an there were children at y
time of y devise -

But if a in y last case had at y time of making y devise,
no children, children is a word of limitation denoting y quantity
of interest devised - i.e. y Children take as Special heirs -

They can't take in remainder as purchasers, for there are no
words of remainder, and they can't take a present estate
as purchasers. for they are not in. Esse - Therefore A takes
an Estate Tail, and they of course as issue in Tail per
formam doni -

And note as a gen rule, yt y testator's intention is to be
collected from a reference to y state of things at y time
of making y devise, not at y time of his death -

Goody Rule

As to y wife - means, to her who was his wife at y
time of making y will, and not a subsequent wife -

The description of devisees may be general or special, By a general
description is meant a designation of any person, who may happen
to answer y description - Pow 345.61

As if I devise to G B in Tail, remainder to y next heir
male of y devisor He who happens to be next heir male is devisee -
2 Eqly Es 290 Pow 347 -

So a devisee may be constituted by a devise to such a stock
or house. It will enure to y heir, principle of y house or
stock -

If a devise is made to y posterity of A, his lineal heirs, if he
have any shall take, if not his collateral heirs of y whole blood -

If a devise is made to y next of y name of y testator, y next
relation of his name, an male & female shall take -

So a devisee may be described by y devisees words, next of kin
to y testator, in wh case y person answering y description, by rules of construction
combining

y degree of kindred will take - 3 East 278 - 4 Bro Chy 267. 3 do 76 - 234
 In y^e case ~~an~~ only those answering y^e description under y^e G^r
 of distribution will take, y^e legal compilation of those degrees
 under y^e G^r, always relates to y^e time of y^e death of y^e Testator.
 such being y^e rule under y^e G^r of distribution -

And if a particular estate to another is interposed, still
 y^e words, "next of kin" are construed to include, those and those
 only, who answer y^e description at y^e time of y^e Testator's death -
 These words are construed as they are in y^e G^r.

To y^e words, "nearest relations of my name" is a good description.
 But in y^e case, relation is "nomen collectivum" I include
 all y^e Testator's nearest relations in y^e degree mentioned -
 as all his brothers, sisters, of y^e same name, if he has no
 nearer relations - Thus Sisters, if married, and of a diff^t
 name wd be excluded in y^e case - 1. bes. 335. Pow 347. 497-78

And when one devises lands to y^e "next of his name", it
 has been a question how far a daughter, who being married
 has changed her name, can take -

But some y^e is y^e distinction - If she is unmarried, both
 both at y^e time of y^e devise and at y^e time of y^e Testator's death
 she may take, tho' married when y^e question when y^e question
 arises - Secus if married, either at y^e time of y^e devise,
 or of y^e Testator's death - 1. bes 338. Cro Eliz 576. 32. Pow 350-2, 3.

But La Hardwick, seems to think, yt if y^e devise is immediate
 or by way of vested remainder, tis satis if she is unmarried at
 y^e time of y^e devise - If limited upon a contingency, yt y^e name
 at y^e time of y^e contingency's happening - decides her right -

This seems reasonable and confirms y^e general rule -

If y^e Testator explains, to whom he means by nearest relatives

persons not falling within y description may take - as to my nearest relation in y title, and knows, Here y latter, tho' not so near as y former, shall take with ym -

If one devises to his nearest relations, kata y It of distribution, his wife as such takes no part, for the she wd be entitled to a part under y It, she is not as wife his relation, & not related by consanguinity - not of kin -

3. Atk 759. 51. 4 Bes 84 - Pow 350. 51 -

If one bequeaths Personal property to his nearest relations, those relations who wd take under y It of distribution - are legatees. So G. supposes, if y words were my relations -

But Parol Eri may limit y words - Post 112 -

But if y devisees of land are thus described, Quere an y above rule wd hold, an y devise wd be void for uncertainty -

In Comt and y other States of y Union - I G. presumes, y It is wd ascertain y devisees in y last case as well as y first - For Comt It regulates y succession as to Real and Personal Estate of Intestate -

It is a general rule of construction founded on feudal principles, yt if an estate is devised to one with an immediate or intermediate remainder to his heirs, y "heirs of his body," or "his issue" he takes an estate of inheritance in y first case, and in y last an estate Tail.

The object of y rule is y preservation of y claims of y feudal Lord, upon an heir succeeding to lands by descent, who wd not be asserted as one coming in by purchase -

1. Co 39. Co 2 Pow C. 41 - 2 Wils 323 -

4 TR 82 = 294. 3 Leaw. 437

3 Burr 38 - 8 TR 16 -

1. 20 503 - 6. 20 30 - 5. 20 299. 320

320

When y remainder is post an intermediate limitation, y devisee takes an estate for life & y inheritance in y remainder, y former is not merged -

The word "heirs" &c are descriptive of y interest limited to y ancestor, and y sense of those words, has now become interwoven with y whole frame and structure of y law of Real property -

The words, "heirs" in such case are construed as words of limitation, not of description, i.e. to ascertain y interest given to y first devisee, and not to designate who are to take after him -

And where no previous freehold limited to y ancestor, y word "heirs", is as apt a word of description, as any other -

And when no previous freehold is limited to y ancestor &c -

But as y reason of the rule has ceased with y abolition of y feudal tenure, its endeavour as far as possible in y construction of devises to narrow y application of it - It is allowed, almost always to defeat y intention. By y application of y Rule, ^{by it} is after 2d Rule -

An heir may ergo by devise at y's day, take a remainder as a purchaser under y description of heir &c. And a previous freehold is limited by y same devise to his ancestor, if it appear from y devise, yt y word "heir" was intended as a descriptio personarum. Estates in possession &c 14 - Ex as to A for life, remainder to his heirs for life only - So to A for life, remainder to his heirs for life only) & to his eldest issue male, a takes for life only - 1. atts 411. Pow 359 - Moor 372 - Pow 358 - Cro Eliz 14. So 313 Contra.

Secus if it had been limited to his eldest heir -

So to B for life, and his issue male, and his heirs forever, Here B takes an estate for life only, and his issue male, a remainder in fee, for if B took in tail, y last of y limitation wd be nugatory or repugnant - Lathe 224. Id Raym 203 -

Issue in its most proper sense is a descriptio personarum but it has been generally construed a word of limitation - in when y intention to use it, in its proper sense, has been manifest -

^{co a} If an Estate is devised for life and post to y next heir male, (in y singular number) and to y heirs male of his body, heir is a word of description - a takes for life only - and y next heir male a remainder by purchase - Secus y word, "next" and y superadded words, are wholly nugatory -
of limitation -

Lathe 224.

cro Eliz 40

cro Eliz 40-60

Lathe 224 17. B.

Id Raym 203

4 Burr 2579

1. Egly C. 184.

Secus generally if y limitation were to A for life, and post to y heirs of his body (in y plural number) & their heirs, or heirs male, y second limitation being more nearly in y technical form of words of inheritance -

Special Description

Second a description of y devisee may be special -

By yd is meant a description of a particular person, not a designation of any (as in y above cases) person who may happen to answer y description. As to y son of A. Here y description designates not merely a son, but a particular son of A. Dyer 357 Pow 365 - P. 83 -

So to y heirs male of y body of A now living &c to y present heir apparent of A: for y word "heir" taken to y manifest intent, must be used in y technical sense - a being alive at y time of y death of y Testator - 1 Ely. Ab 214. 1. Ben. 334 - 2 Co 311. Raym 330 - 3 Heble 32. 2 Ben 660 - Pow. 365 -

So to a second son of A - This is a special description of y son in y order of birth -

Gen Rule - It is unnecessary, yt y devisee answer in all respects y description given him - But it is not universally so - Pow 367

Hence if y devisee is described as y heir of such a person, he must show, yt he is heir, in yt sense in wh y word is used by y Testator - Thus if one devise to y heirs of B generally, and B is attainted of felony -

B's eldest son can't take, for B can have no heir -

1. Selwyn 132 -

Lenk's 263 - Pow 367

Note yd description is general &c. of any one who shall happen to be B's heir at Law at his death -

So if one devise to y heir of B, and dies, leaving B - 2 Leon. 70. 1. Co 66 - B's eldest son can't take, for "nemo est heres viventis" -

This description is general, as in y last case - Dyer 99. a Pow 369 -

1. Selwyn 193. Lenk's 263 - Pow 367 P.

So if y Testator describe any particular heir, as y heir female of B withal name, y person to take, must answer y description, in y particulars, &c. she must be heir, as well as female - Ergo if B has a son, his daughter can't take -

These y^e rule don't seem to be law at y^e day - vide Estates
in possession § 21 Hobart 34. Co Litt 28. B. 29 a. 2 Mills 1 -
Pow 370. 382. 85 -

But if y^e devise itself shows by positive words, or necessary
implication, yt a person not his heir general was intended to take
under y^e description of a particular heir, in other words if a special
description is added to yt heir, a person who ant heir may take
under y^e description - As "to my heirs who is ^{brother} my A B -

A B will take, And not heir general - Hobart 34. 1 vent 372

1. Id (Raym^d 185. Pac Ry 462 - 447. 400 - 64. 65 -

So if y^e intention is clear (ut supra) one may take under y^e
description of heir in y^e lifetime of his ancestor, as if y^e testator take
notice yt y^e ancestor is living - As to y^e heir male of y^e body of A,
giving A also a legacy - Here heir is construed, heir apparent,
for it is y^e manifest intention of y^e testator, yt y^e issue of A shall
take, while A himself is living - He cd not ergo mean as heir
in y^e technical sense of y^e word - 1. P Wms 229 -

Pow 370-378

1. Br P. C. 489 - 2 Bl R 1010

Gen Rule -
Universal

And it is general rule of construction in all questions arising
upon devises - yt y^e intention of y^e testator shall govern, if consistent
with y^e rules of law - I.E. if y^e nature of y^e limitation is such as
y^e law as y^e allows - Doug 327 329. Wyer 24 -

This is y^e great rule of the exposition of devises -

But there has been much doubt, ^{an} if an Estate is given
to A, remainder to y^e heirs female, or male, of y^e body of B -

Co Litt 164. a

note 2 -

Pow 381. 385.

it wd be necessary, yt y^e person to take shd be heir, as well
female or male, as to y^e heirs female of y^e body of B -
While his daughter takes, he having a son -

The distinction between y^e case and yt in y^e last page, is
yt heir female with more, denotes heir general -

Of course a person to take under yt description, must be
thoroly heir at Law -

But heir female of one's body denotes his female issues,
an heir gen or not, for y^e law recognizes a special heir of
one's body - but no special heir, in of y^e body -

A person, who in no sense, answers y description of an heir,
may take under words constituting an heir - or importing to
to constitute an heir -

Hobart 75. Moy 48. Stile 308. - Powel 398. 95 -

This is a general Rule, yt if y description of y devisee be so certain
yt y person intended can't be mistaken, y devise shan't fail
for a small inaccuracy -

1. W. 335. 10. C. 37. B. 6. Eliz 106. - Hobart 32. Pow 3489, 422

as where a devise was made to Margen y daughter of
J. L. he having only a daughter, named Margeret, she shall take
C. Litt 3. u. Pow. 305. 7

Where a man devised property to y wife of J. L. and she died,
and he married another wife, y wife's first representatives shall
take - 10. Mod 371. - Plow 344. - Pow. 405. 6 -

Where a man in his illness, devised to his posthumous son -
y son was born before he died, and he took, quia he meant
yt son, then in utero. Proc. Chy 175. Pow 406.

But where y description is entirely false, y party intended,
shall not take, tho certainly known - 1. Selwin 193. Pow 407 -

How a devise may fail of taking effect -

A devise is ineffectual either from defect appearing on y face
of it or from something extrinsic -

Of y first kind, is any uncertainty, or repugnancy of y words
used as to y thing devised, or y interest in it -

As to y general intent of y deviser, such a repugnancy or uncertainty
is called a Patent ambiguity. - Pow 341 -

So a limitation contrary to y policy of y law - will
fall under defects apparent upon y face of y devise as Perpetuity -
Nide supra

Extrinsic objections to y validity of devises are founded on some uncertainty, or repugnancy arising out of facts not appearing on y face of y instrumt. As where a doubt arises to whom of several persons, or to wh of several things respectively answering y description used, y words were intended to apply. Uncertainty or repugnancy of y kind is called a Latent ambiguity -

Latent Ambiguity -

Pow. 411.

As to defects apparent on y face of y devise - It's a an universal rule of construction, yt if there is in a devise, an uncertainty, wh cant be explained, or a repugnancy wh cant be reconciled - y devise is void, so far as y uncertainty extends, and y heir at Law shall be preferred - No Parol Evi is in gen admitted -

Pow 411 -

Such an uncertainty apparent on y face of y devise, may be either - First as to y subject matter, or thing devised -

Second - The quantity of interest meant to be conveyed
Third - The person described as Devisee -

First
2 P. 498 -
1. P. 600 -
1. P. 600
2. J. R. 498.

First, as to y subject matter, or thing devised, as I devise a part of my land to D. 1. B. et Pull 53. 2. Co 32. Cro Elr 16. 113. 704 -

The devise of a messuage or house with y appurtenances, it carries no other land yon is necessary to y enjoyment of y house, unless it appears, yt y words were intended to be used in a more general sense - Ibid. as y ways to it -

Parol Evi is not allowed to explain y intent -

Secondly -

As to y quantity of interest - as I devise my freehold to my wife for five yrs. And if any of my 3 sons die, before y five yrs are out, of y freehold, then to be divided equally. 830.

What is to be devised y freehold, or term for 5 yrs.
Pow 412. 14. 1. R. 692. 754. 53. 2. Ely Co 387.

Parol Evi not admitted Post 105. 9.

3^d As to y person described — If y person described as devisee, is absolutely uncertain, y devise is void — As to y best man 3^d East in y Parish of A — So to one of y sons of B. he having 172. 418. born 624, several. Post 109. — 2 born 624. 5. Raymud 82. 1. Roll 609. —

5 So. So 2^d of y poorest of my relations — Post 103 — 2^d 1 Buls. 91. — Stiles 240 — There can be no enquiry about it,

no Elvi But a devise is never construed void from uncertainty, ni ^{quia it arises} from necessity — Tis to be explained, if possible ante 87 — ^{from y instrument, and y must settle y uncertainty} 10 Mod. 103. — Herbert 32. 1. Res. 339. Co 57. B. 2 Lo Raymud 1312 —

Latent Ambiguity.

person Of from extrinsic facts, y person of y devisee is rendered absolutely ^{explained} uncertain, y devise is void, As to my son. there being several, it may be explained So to B. of A. there being 2 of yt name there... 5 Co 62. B. — Pow. 324 — 6 PR 671. 2 atks 374.5.

subject matter, So if from extrinsic circumstances, it is absolutely uncertain what is meant, As my Manor of A, he having 8 of yt name — 2. atks 374.5. Pow 425.

The meaning is, these 2 cases of devises must fail, if there is no proof aliunde to ascertain y person or subject intended —

Now far parol Evie is admissible in such cases vide 107. 9.

Ante 73. But if y devise were of any one of my manors,

A y Devisee might elect — Pow 425. — Bacons Max. 100 —

A devise may fail if that y devisee dies, as because y Testator's intent is contrary to y rules of law, this is an ^{extrinsic} defect As to A in fee simple if he dies without heirs, to B y limitation to B is void — it can't carry a remainder — for y limitation is in fee — Nor a conditional fee by way of executory devise, quia, y contingency is too remote — Estates in Lands — Bath 234 — Pow 431. — 1. Buls 63. Pow 426. 3 PR 145. 6.

Contrary to y Rules of Law — 3.

So if in y draught of y Instrument, y Testator's ^{instructions} intent is not followed. For y Instrument ant y Testator's act in law —

As where a Testator directed a devise of lands to A for life. Moore 356 but y words carry a fee, it is void in toto. It is not good devise for life, nor will it pass a fee, for yt was contrary to y intention Pow 426. 7. 426. 7. 426. 7.

But if yt wh is agreeable to y Testator's intent, can be separated from yt wh is contrary, y former is good, y latter void -

As Testator directs an absolute devise, y scrivener annexes a condition, y condition only is void, y devise is absolute -

1. Leon: 113- Pow 427-

Because
Because it
nd effect no
more nor
less, ym
law ind -

A devise may fail, because of operation it no effect no more y n y law - no intent it - as Tenant in fee devises y land in fee to his own eldest son or next heir. The devise is void, The son takes by descent. Post 161- Robert 29. 1. Res Pn 17 Pow 427. 8-

2 atks 37- 2 Burr 880- Polk Re. 187- 2 Co 51- Pow 420-

As to what acts will break y line of descent Co Litt 126.

1. Show 93- Fath 237- Cart 141-

Gen. Rule -

And y rule is y same general yt if a devise is made to a perso. who is his heir, of y same estate, i.e. y same quantity of interest in y subject matter, as he wd have taken by descent, y devise is void - He shall be in by descent, and not by purchase - as heir and not as devisee or purchaser - 1. Ld Ray 728-

Pow 428. 430. 35-

The reason of y rule is, First yt y lord may not be defrauded of y fruits of y tenure - i.e. of his claims upon heirs succeeding to y land by descent - Pow 335. 430- 2^d yt y devisees creditors may not be defrauded of yr debt. Pow 430. 38- 1. Term 248- as they wd have been 'fore y nd fraudulent conveyances - or rather as those conveyances - or devises, for 'fore y Dev

Pow 471. 73- 3. 4- Will - et Mary Pow 355. 430. 38- 2 Pl. Com. 378.

- These reasons have both ceased, but y rule is of consequence in England, as affecting y course of descent from y heir, for y line of descent in y case of land purchased may be different, may from y case of yt acquired by descent. In y latter case,

2. *Reb.* 220.22. 2 *Levens* 127. *Pow* 435-36-

In general, y Rule of *Connt* is for most purposes, not important, neither of y above considerations operates here, for y line of descent is y same, as to lands acquired by devise, deed, or gift -

nec does it affect exors, quia y devisee can't take till y debts are paid -

But suppose a person having 2 heirs A and B, devises his half estate to A and dies intestate, and as to y other half - y part considered as descending will be first applied to y payment of debts.

But ys don't seem to render y rule important here - in y sense contemplated, for y case isn't within it - A wd take by devise according to y distinction in *Pow* 409-441-

Might it not be important in y case of a posthumous heir?

If one devise to his heir by way of remainder, what wd descend to him as a reversion, still y case is within y general Rule for y Estate is not altered - As to my wife for life, remainder to J. J. being the devisors next heir, y devise to J. J. is void - He takes y reversion after y life estate, by descent -

1. *P. M.* 23-1. *Lo Ray* 1. *Roll* 626-4 *Str* 491- *Path* 234- 3 *Leav.* 127- 2.

So of a devise of an estate for life only, for y devisors heir, at Law, if no further disposition of y subject matter, for he takes all y interest, he wd have taken, if there had been no devise, and y fee simple wh descends, merges y estate for life -

Aliter if a less quantity ^{interest} were devised to him, and y residue devised to another.

3 *Leon.* 26. *Pow.* 431-2. These auth belong above.

Charging debts or portions on an estate devised, don't enable

him to take by purchase, for y quantity of interest isn't altered, y property is only incumbered -

This is when a man devises

a fee simple to his heir at Law -

Co Elvi 833. 819. *Corry* no 172-

But it has been held, yt if y charge on y land is by

70, *Raymond* 78- 2 *HB C.*

1^{ro} Ch. 161-

2nd Mod 286-

1 Freeman 748-

Pow 438

Contra

Comyns R 32-

Salk 422-

En. Elvi 893-

Pow 438- 919-

Pow

Leath

of condition, y heir to whom it is devised, takes by purchase
as to my eldest son and his heirs upon condition, provided
yt he pay- The weight of authority is y^o Rule -

(If then a devise is made, wh falls within y Gen Rule,
y testator's heir, who at y devisors ^{death} happens to be a
daughter, y birth of a posthumous son will divest her title,
for she takes by descent, as heir, quia at y testator's death
she is heir, and of course her estate is liable to be divested
by y birth of y posthumous son, as if no devise had been
made- 2 Pol 208. Pow. 438-9-

An alteration of y devise as to y time of y heirs receiving y
Estate, don't enable him to take by purchase, y quantity
of interest is y same- Salk 234. 241. Comyns R 72-

Pow 430-31. 34-

Pow 439-

Yet if y limitation to y devisors heir by devise, produce
an alteration in y course of descent, he takes by purchase.
IE. as devisee - as if one having 2 daughters, who are his
heirs, devises to ym and their heirs, they take as devisees -
for y devise makes ym ^{Joint} Tenant. Whereas if they take
as heirs, they are coparceners, each having a distinct moiety.

Pow 439-
30-

3 Lev 127. 8- 1. Leonard 112. 13. En. Elvi 431-

So if one having 2 daughters who are his heirs, devise all
his estate to one, she takes y whole by purchase, for if
she took only by y ^{descent} ~~descent~~, her sister, wd be coparcener
with her of y other half- and y interest defeated-

Pow 441-

Le. Raymo 829- Co Litt 163. B. Salk 242- Comyns R. 123-

And a devise may upon y general principle in question,
be good in part, and void in part, as to one entire thing,
as Tenant in fee devises one half of B Acre to B his heir,
in fee- y other to him in tail- Is void as to y former,
and good as to y latter- for as to y latter, y devise limits
to him y same interest, as y rule of descents wd give him.
as to y latter a. gives a different Estate-
former. it

at Law
2
2 Le. Ray- 830-
Pow. 442-

A devise may fail of taking effect, by y death of y devisee,
y Testator living. - As to A and his heir. A dies, living y devisee is
y Testator. As heirs can't take, for y estate is devised to A y devisee is
only and his heirs are added to show what estate, he takes - called a
And y is y case, tho y devise is republished after A's death,
for y limitation being considered as made at y time of y lapsed
republishing, is to a dead man - 4 T.B. 601 - Plow. 340-45 - one

2 Bern 722. Prange 25. 1. P.M. 397. Goug 323. Pow. 601-76-77.

But if a charge is created on y Estates, as debts or legacies, y charge remains, for y is not effected by y devisee's death. It don't depend upon his taking— 2. N.B. 349.

A Devise may also fail of effect, by y devisees waiving y benefit of it.

The waiver may be express or implied—

See Express when y devise actually refuses to accept-
of y devise: Pow 448 442.3.

An amplified name arises from some act of a denier, from
wh. it is implied, yet he don't accept.

It is a general rule in Equity, yt if a devisee having a right to part of a devise, independently of y devise, and a claim to another part by y devise, ~~accepts~~ ^{assents} y former in opposition to y devise, he waives y ~~former~~ ^{assents} ~~part~~ ^{part} - It is an implied waiver.

As 1/2 Acre is settled on a for life, remainder to the his ^{younger} son ^{of B.} B.
White acre is as in fee

a devised B A - to a stranger and white acre to y son of B.
If B insists on having B A. under y settlement, he can't
have White acre under y devise - 2 Bern. ~~581.232.3-~~

Saltot 176 - Pow. 443 - 454 -

The same Rule when a Testator's widow claims dower in opposition to his will, and also an estate under it -

Phid

This doctrine of implied power is founded on y idea of a tacit or a rule
tacit condition annexed to y devise, yt if y devisee ^{will} ~~do~~ ^{won't} ~~disturb~~ y
disposition, yt y testator has made - If then he ^{won't}

Pow 445-6. 53.4- he does disturb it, he waves all claim under it, for he
 Talbot 176- ought not to assert a right in opposition to y will,
 2 Ves 14. 617- and at y same time claim a matter of mere bounty under
 1. Ves. 238-426- it-

And it isn't necessary to give effect to y Rule, if y
 Talbot 176- thing devised be of y same nature and of equal value -
 2 Ves 14- to y to wh y devisee has a claim independtly of y devise
 Pow 456-53.54- Ibid-

In such case Equity will make y Devisee elect -
 vide *Proximus potius ultima*

Another Rule-

But if y Devisee is a creditor claiming under y devise,
 in that character, and not a mere volunteer, y Rule don't
 apply - As If one devise a part of his estate for y paymt
 2 P Wms 412- of debt, and devise to PP, another part, to wh a creditor
 2 Ves. 617-30- had a higher title, & n y devisee, y creditor may assert
 Pow 454.58- his title to y latter, and shall claim his share of y assets
 463- devised to pay debt, for y Estate devised to PP is y creditors
 In y one, and his claim under y devise for y paymt of debt, is not
 as in the preceding cases, "eo gratia, sed ex debito justitiae -"
 And Equity don't forbid him to assert as y will, and
 at y same time insist upon a claim of Justice under it -

wh A

So if lands, to which A has a higher claim, yn y Testator,
 are devised to B, by an instrument not executed, so as to
 1. Ves. 298-307 pass lands, and a legacy to A, he may claim y legacy and
 get hold y land Then y latent condition don't apply - for y
 Pow 458- Testator hasn't disposed of y land, as to y there is no devise,
 for y devise not being executed kata y It, is quoad y
 land, independtly of any question as to y Testator's title,
 a nullity -

Still if there is an express clause in y devise, yt a Legatee
 disputing y will, shall forfeit y legacy - his claiming y land
 devised in y last case, will defeat y ~~will~~ legacy, for yd wd
 be in violation of y express condition annexed to y legacy

a condition wh^y Testator had a right to make, and to support y legatee's claim to y bequest, no be to defeat y express intention of y Testator - 1. Body 12. Pow. 460. 62-

If y Testator give a legacy to one in satisfaction, or instead of a particular thing expressed, yt shall not exclude him from another benefit, tho' y legatee's claiming y latter may be contrary to y testator's will - As Testator's wife is entitled under a marriage settlement to a portion in lands and another in money - He gives her legacy in satisfaction of y money portion and devises y lands to D. G. She may claim both land & legacy - tho' she cant claim both y land and y money portion, for y legacy is expressed to be in lieu of yt, tho' not of y lands -

What takes y case out of y General rule is, yt y operation of y legacy as a satisfaction is expressly confined to y money portion, wh^y was already y legatee's, and her claim to y land, being also ex debito justicie - Equity ought to not to exclude y satisfaction to yt by way of construction - or by construction -

And in all cases in order to oblige y devisee to elect (at once) it must be clearly evinced yt y devisee's taking both interests, will defeat y general intent of y devisor - As Testator having devised 100 Acre to his wife, immediately devised to her 10 Acre by way of remainder - This don't prevent her from claiming dower in 10 Acre -

3 Atk. 430 -
2 Bern. 365 -
Ed. Ray - 438
2 Eq. Cl. 301 -
Pow. 466-69 -
Ed. Raym. 438 -
2 Eq. Cl. 301 -
Pow. 69 -

So a wife may claim her marriage settlement, tho' not devised to her, and a residuary legacy, for in neither of these cases are y claims clearly repugnant to y testator's intention -

A devise may fail of effect, by y testator's performing in his lifetime, what it was y object of y devise to accomplish. As Testator devised 100 L. to complete a building, and post before his death

expended more ym yt sum on y house - - His heir shall not have y benefit of y devise. 1. Vern. 95. Pow. 470-71.

So a devise may fail of effect in consequence of y ^{It} of ^{admit} debt 3 et 4. ^{It} met Mary - vs fraudulent devise - under y^s ^{It}, charges y land, all devises of lands are void as vs ^{devisee's} bond creditor's, The creditors are entitled to satisfaction out of y land, if y other assets fail. The heir and devisee must be sued jointly.
Pow 471. to 4. 2 Bl Com. 378. 3 atks 434 - 2 Do 125. 1. O. M. 129.

Before y^s ^{It}, devisees ^{ced} selling or aliening before action bro't, "Say's Pow." excluded y testator's creditors. 2 Bl. 378. Pow 473 - This ^{It} is liberally construed.

^{For} ^{Connt} y ^{devisee} ^{can't} have y benefit of y devise, till ^{all} y debts are paid. The eng ^{It} affects y relative rights of creditors & devisees only - It don't relate to those of heirs and devisees i.e. y ^{It} ^{subjecting} lands in y hands of devisees, don't discharge lands in y hands of y heir by descent. Therefore ^{lands} descended are liable to creditors before lands devised. The devisee is a purchaser.
2 atks 435. 3 Co 12. B - Pow. 474-5 -

How far Parol Evidence may be allowed
to control or explain a devise.

Every instrument consists of matter of fact and matter of law. The former may be averred and proved on an issue in fact.

As whether y Instrument was executed? An post execution, if it was attested?

But matter of law is not subject of averment, for it is triable by a Jury, ergo not provable as a fact.

An uncertainty of y former kind is a latent ambiguity, of y latter, patent. Evi 91. 5-

Hence y gen rule, yt y testator's declarations can't be given in Evi to control y operation of y words used in y devise, or to give ym an import, not on y face of ym, they can't bear.

This rule has obtained, ever since devises were required to be written and before y St of frauds. It holds in y case of Mills at C Law. Pow' 513- Plow. 345. 5 Co 68- Cro Lam. 145- 2 P M 136.7- 141- Pow. 513-

Little Evi 91-

Indeed no parol evi is admissible regularly to give y words such a meaning, tho sometimes allowed to vary y "Prima facie" meaning - of words used - still it must give ym a meaning, they can bear -

The testator's declarations may apply to y devise or y devisee or y person rather of y devisee - In both cases, they are inadmissible when they relate to matters of Law i.e. to matters of construction on y face of y Instrument.

First as to y import of y devise itself. as devise to a and y heirs of his body, remainder to B and y heirs male of his body - on condition yt he, or they, shall not alien, here parol evi ant admissible to show who are meant by he or they 6. RR 671- Pow 478-

It is a matter of legal construction upon y face of y devise. -

Pow. 67- 87. 8 Co

So if one devise to his wife generally - parol evi ant admissible to prove it was meant to be instead of dower - for y intention ought to have been expressed - 4. Co 4. at 5. Ld Ray 438- 1. Eqty Cd. 213-

Page 120-

So when a devise was on condition, even letters by y testator were not admitted to prove yt y events wh had happened, were intended by him to amount to a breach of y condition; for y letters were not accompanied with y requisites to a devise - as prescribed by y St of frauds - Lathe. 232 - 2 Bern. 333- Pow. 480- 83- Pre Chy 138- 1 Ned 231- Pow. 483-

So where one having covenanted to sell his estate to his son in law, for 1000 £ 1 less ym it was worth - Devised 1500 £ to his son in law, parol Evi not admitted to prove yt y legacy was in satisfaction of y contract -

2. P. M. 316-
1. Res. 189-
2. Atty 216-
373-

So in a devise of land to y testator's daughter, parcel Evi of his intention of y land shd not be subject to her husband's debts, was excluded.

In R &
the son
would
take.

Secondly as to y person of y devisee - where a devise was made to A who died, y testator living - Evi was not admitted to prove y testator's intention (declaration) of B. A's son, not shd take what A wd have taken, had he been alive - There is no ambiguity patent or latent, y Evi, if admitted, wd be virtually a parcel addition to y devise, essentially altering its effect, Indeed, wd be a new distinct devise by (parcel) to y son -

So devise to y heirs of y body of A and if he die without issue, to B. The testator dies, a living, his issue therefore can't take, for "nemo est heres viventis" and parcel Evi of y testator's intention to give to A's children, during A's life, can't be admitted - For an or no his issue was intended to take, he living, ~~was~~ is a question of construction on y face of y devise -

Rec
Ore Chy 54-
2 Res. 216.17-
Pow. 500-
Plow. 345-
Cro Eliz 422-
2 Leon. 70-

So where y testator mentioned two women, and devised to her, parcel Evi want admitted to show, wh of y two was meant, for y ambiguity arose on y face of y instrument, and was ergo matter of mere construction -

Latent
Ambiguities.

But as to what are called matters of fact - i.e. as to latent ambiguity, y rule is, y- Parcel Evi is admissible to explain ym, & matter avowed stands with y words of y devise -

But not to contradict y words -

The rule as to E & Law consequences is y same -

Thus if one devise or grant to his son A (he having 2 sons of y name) parcel Evi to they, y y younger son was intended, is admissible.

Latent
Talbot 240-
2 Resy 216-
Pow. 487-8
495
512
521.25-

In y case y eldest and youngest have y same name &
as where y testator supposed y eldest son to be dead, and
his declarations in such cases can be proved - Pow 488-89-
for y evi stands with y words of y devise, i.e. is consistent with 8 Co 155-
ym, and an ambiguity created by Parol Evi, i.e. by proof of extrinsic facts 1 bes 231-
facts, may be removed by y same kind of Evi - 5 Co 68 - P. 2 P Mms 137
2 besy 216. 18. 1. P Mms 674 - 675 677

So if y devise were to D of D. there being 2 of y place - ^{devisor} D of D. ^{devisor}
parol Evi is admissible to show to whom was meant - ^{his ma}
Co Litt. 3-10. 1. P Mms 472. Pow 488-89- ^{manor of A, and B}

not Parol Evi has been allowed, to show an instrument was intended in 2
as a deed or a devise, "as that directions were given to make and there are
a will," for yd Evi goes to y execution of y devise i.e. to y ^{two of y name.}
point, and y testator made y writing in question as his will
Mod. 17. 3 Mms 310 - Pow. 14 - 419 -

So if there is a devise made to A (there being father and son
of y name) parol Evi admissible to prove testator didn't know
y father - ^{1. Mms 411-}
Salk 7. 6. Mod 199. ~~411~~ 1. Mms 411-

If y devise is wrongfully named, still if satis described,
he may be proved by parol, to be y person intended - ^{11. Co 21. a}
Co Litt 305 - ^{11. Co}
^{21. a}
Pow 337. 40-465-467-498-99-

The rule in case of deeds, is said to be different -

Co Litt 3-a - Little deeds 25 11. Co 21. a, 4 Crut 35

So a devise to C four children (she having 6) two by A
and 4 by B, parol Evi is admissible to show y four
by B were meant, and even y declarations of y testator may
be proved - ^{2 bes. 216-}
^{Pow 494-505-521}
⁵²¹

But a devise to one of y sons of A (he having several) is ^{21. a}
void, parol Evi is not admissible, for yd a patent ambiguity - ^{Pow 488-90-}
matter of legal construction - ^{Co 155-}

If y name given to y devisee, applies exclusively to one person,
and y description to another, it may be proved by parol, yd

So where a devise is to y Testator's nearest relations, Parol Evi may be allowed to shew, yt he meant certain persons by description, but no further, but his declarations shewing, yt he used y word in an improper sense, can't be proved. Evi of y former kind stand well with y words, declaration of y latter sort don't

In these cases, indeed Evi is never admitted, to give words a sense, they will not bear, on y face of y instrument - Thus the y word son is sometimes used to mean Grandson if there be no son living - (yet if it appear yt y words was meant to mean son, no parol Evi) is admissible,

But if it appear from y devise, yt y word was intended to apply to a son only, no parol Evi will be allowed, to shew yt y word son was meant to apply to Grandson - This wd be to contradict y legal construction - As where there is a legacy in y same instrument to y Grandson -

3 Mod 318-
1. Ventris 340-
Raym. 408-
2 Lewis 243-
2 Vernon 166. 17-
Pow 678-79-

Parol Evi ant admitted to supply y place of any thing not written, as where 2 hundred pounds were devised to a charity; according to y will of Mr. — Evi ant admitted to supply y name, i.e. to shew whose name was intended to fill up y blanky - This wd be to add to y will by Parol and y ambiguity is Patent -

2 Atk 240
Pow 501-523-
2. Eqty 415.
2 Eqty 415.

So when y testator gave directions to have all his personal estate given to his executors, and it was omitted by mistake, Evi of y mistake want allowed, "Voluit sed non dixit" don't make a will - It wd be making a will, or part of one by parol -

of excluding Parol Evi in explaining a Patent ambiguity-

The following
are exception
to y Gen Rule

Cts of law and Equity have also permitted proof of extrinsic facts, to explain equivocal terms or terms of equivocal import, as to quantity of interest devised, when y word stands with y words-

This first Exception-

First

First. Proof of y testator's circumstances has been allowed to ascertain y quantity of interest, y import of y term being equivocal. Thus in a devise of y Testator's "whole estate," to J. S. he paying y testator's debts - Evi may be allowed at y day - y to shew yt y personal estate was insufficient to pay ym - words signifies and therefore a fee must pass, yt y devisee may sell. The Evi thus ~~not~~ proving yt y word "Estate," was used to denote y quantity of interest of y Testator. The word "Estate" being considered equivocal, as denoting either y subject matter only - or y quantity of interest - also -

It is now settled yt "an estate" "ex vi termini" carries a fee, (if y testator had a fee) ni restrained by other words -
1 T. B. 412 -
8. Do 67 -
512. 3 - 5 Do 562. 2 Do 657 - 1. B. et P. 559. 1. T. B. 344 -
6 Do 34 -

The word "hereditaments" don't of itself carry a fee, being rather a description of y subject m of y testator's interest in it -
8 T. B. 513 -
407 -
6 Do 175 - 8. Do 5 Do 558. 3 Do 356 - 1. B. et P. 247, 48 - 258 -

So where y question was upon equivocal words, as a legate of a person's personal estate, took it absolutely, or for life only - (she being y testator's wife) Evi was admitted to prove yt it was non satis to support her, ni she used y principal or stock -

Exception

Second - Proof has dim been admitted (for y same purposes) as to y value of y property. devised -

Thus in a devise of all y testator's land to A, (with words

bu. 506.07
=113 of inheritance) he paying to B \$ 150. in a year, ^{proof} A testator
Prochy was admitted, yt y sum exceeded y annual profits of y land, always intended
71- to shew yt a fee was intended. 2. Eqly Ct 298³ Burr 1898 a County to y

But it seems now settled as a General Rule, yt a devisee
of lands charged with y paymt of a gross sum, or an annuity
or debts carries a fee of course - even tho words of inheritance are 2 N R 343-
not added 8. T R. 1- 503- 5 do 18- 292. 3 do 356. or 4 3 dms 341- 4 East 496-
1. Bet P. 558

So with y word "land"

2. 250.
- 251-

And in y case of a devise to, to y land, he paying 100 \$, or my
debts &c, for seems y devisee instead of being benefitted by a
devise, might be a loser, for he might die y next day post
y testator, and yet by such clauses he is personally bound, to pay
y charges at all events, if he takes y Estate.

And y value of y estate compared with y charge, is not material.

But there is an established distinction between cases like y last 8. T R. 1-
(in wch y charge binds y person of y devisee) and those in wch 4 East 500-
it attaches on y land, - and y devisee is ^{not} bound to pay, in y profits 5 East 92.96
are satis, so yt he can't be a loser - ergo he shall take a fee estate, 2 Bet = 98-
T R. 250

if there are no words of inheritance -

Under a devise of "land," my debts &c being paid thereout" y
devisee was held to take a fee 3 T R. 353. Is y consistent
with y last case?

5 East 36.
T R. 250 -
these words
make y difference
evident

"Thereout" and "out of y profits" may appear to be substantially
y same, But "thereout" seems to mean out of y land, not out
of y profits - Is not y distinction, yt in y second ~~devise~~ case,
y devisee is of a residuary interest, i.e. of land remaining post y
sale of part - for y paymt of debts. &c. In wch case y devisee
wd have nothing to pay out of y land he takes. But is to sell
and ergo takes a fee, In a later case, y devisee paying "thereout"
was held to carry a fee - 5 East 98-99. 87. 93- Contra 2
N R 249- Quere aut y former y better opinion?
2 N R 349. 50-

But a devise of "all y rest of my lands and tenements & hereditaments,"
 in a post payment of debts, carries only a life estate - 5 Pl 558-64.
 6. Do 175- 5 East 89- 2 atk 341- 4 East 499- 2 B & P 247-

Contray 1. B & P. 558-

But yd is only a residuary devise, i.e. a limitation of what remains,
 post y debts &c are paid. not of an interest subject to y debt.

So yt y devisee wd not be bound to pay anything -

Aliter doubtless if y word Estate had been substituted for lands

Exception

Thirdy - Proof may be allowed as to y condition of y testator's
 family, to ascertain y application of a term, wh may be a
~~word~~ ^{term}, wh may be a word either of purchase or of limitation -

c. Co 17-

Long 310-9-

1 Ventm 227.31-

4 Pl 294-

1 Ha 36 454
460-

As in a devise to A and his children or his issue -

proof is admitted as to y fact of his having children - or

not at y time of y devise made - If he has children at yt

time, he and they take an estate as JT Tenants for yr lives -

If not, an estate Tail in A is created. Vide Estates in fee tail.

Exception - Fourthly -

Plm 234 -

Raym 381 -

1 Holt 744 -

1 B. P. C. 108 -

y state of
 out in yd

case y evi

was not prod,

but yt of title
 deeds

Cow 508-9-

Evi may be admitted as to y state of y testator's property,
 for a similar purpose, i.e. to ascertain y meaning of words, not
 in themselves equivocal, but where considered in reference to
 his property, will bear and require a construction different
 from yt, wh they "Prima Facie" ^{bear}, as in y case of a devise of a
 house called "Bell Tavern" - to A. Proof was allowed to show
 yt A was himself Tenant in Tail of y house - and yt y Devisor
 had only y reversion - in order to show yt an estate in fee
 was intended - No such testimony was ever recd J.C. helures,
 as to any other extrinsic fact -

Seneca vs Pounts So in one case, evi was admitted as to y estate of y testator's
 1. Pounts Chy property, to explain y sense in wh y word "sum" was used,
 472- or to direct y application of y term, an ^(sum) it referred to y
 Pounts 513. to 17- dividends or stocks themselves.

In these cases, y proof stands with y words, tho' not with y meaning, n^t they "prima facie" convey. These constitute all y exceptions to y General rule excluding parol evi; saving for y purpose of rebutting an Equity -

Note y^s -
rule -

But no averment, yt don't stand with y words, can be admitted -
Thus where one devised to y children of A (he having 6)
Evi want admitted, to shew yt y^r only y^r were intended, because
yt wd contradict y words

2. Ves. 216-

Pow. 524-

484-5-15

Pow 524. 12-
5. to 12,

So where y Testator devised y residue of his estate to his executors,
one of ym being indebted to him 3000 £, Evi want admitted
to shew, yt it was his intention to forgive y debt. For y residuary
clause included it., y Evi ergo wd contradict y wills 1st & y
residuary clause -

Saltor 240-

Sts 121-

Pow 522. 23.
323

So where y residuum of y testator's property was not disposed of,
Evi want admitted to shew yt y testator's intention was, yt his
executor sh^d ^(not) have it - for it wd be directly vs legal implication

adms
Eas and adms.

2 Bac. 426-H. 2

H. 5.
Pow 524-

But in Chy and there only, parol Evi of y testator's declarations. This rule is
is admitted to rebut an Equity ^{by} ^{or} an implication (i.e. an equitable applicable
implication or inference) not to establish it. An equity means to all Instrum^{ts}
in general, an equitable claim, but y meaning of y rule, as here
applied to a case of a devise is y^s, When from y face of y
devise, Equity raises an inference, n^t is contrary to y legal conclusion -
arising from it, parol Evi is admissible to rebut or control
y former, (equitable interest) n^t is in effect to establish y
latter, (legal conclusion) See y reasons in title Powers of Chy -

As if land is devised to an executor for payment of debts,
y surplus belongs at Law, to y executor, In Equity, there is a
resulting Trust, as to y surplus, to y heir. Pow 324. 525)

In y^s Evi is admitted, (on a bill by y heir) even of y Testator's
declarations to shew, yt y executor was intended to have a surplus.

this not to, more y contrary -
 vide infra aut

The principal of y distinction is, yt equitable interposition is
 decreeing relief, being discretionary. Chy will admit Evi abunde,
 (even inferior Evi) to direct y Chancellor's conscience, as to
 an he ought to interfere, or allow y C Law to take its course -
 vide infra -

The evi is then allowed not to vary or qualify y legal effect,
 Pow. 524. 26. 8- but to ascertain an Equity shall interpose vs it, not to enable
 Salbot 79-240, or induce him to interpose, but to prevent him from interposition -
 2^d Equity C 506, at all, by showing yt it wd be inequitable to decree in pursuance
 1. Res 320- of y prayer of y bill, vs y actual interest of y Testator -
 2 Rem 677. 677. intention

So where y Testator bequeathed 250 £ a piece to A and B.
 and post by a codicil, directed here executor to pay 250 £
 each - Evi is allowed to shew yt both sums were intended
 to be given, for ys went in y support of y letter of y Instrument,
 And perhaps vs y construction of it in Equity -

So upon y same principle, when y Testator gave considerable
 legacies to a testator executor, from wth y inference in Equity was
 yt he never met to have a residuum, Evi was admitted (of y
 Testator's declaration) yt y Executor shd have it -

And upon y ground of y ^{yt} Evi offered, don't contradict y wife
 parol has been admitted to shew yt a devise was intended,
 as a performance of a previous agreamt, as an agreamt by marriage
 articles to settle 100 pds per annum - on y wife - The husband
 devised to her one hundred pds, Evi was admitted to shew
 yt y devise was meant, as a performance of y agreamt - Here
 y Evi is allowed not to affect y will, but to prevent a
 double satisfaction of an agreamt -

1. Res 323. 3

Pow 529-

onward

295.
What distinguishes y^e case from those before. ni it be, if y^e provision for y^e wife be in both instrumts, precisely y^e same, and made for y^e same precise object, viz a settlement on her, for her maintenance? But aint it rather y^e principle of rebutting an Equity?

Parol Evi is admitted in all cases to counteract fraud, This The most solemn instrument may be aside on y^e ground of fraud, by Parol Evi.
where one devised his Real Estate to his creditors, & omitted to charge y^e Estate with an annuity devised to A, quia y^e Executors promised to pay it - Evi of y^e Executor's promise was allowed - 2 Vern. 506 - Pow 530,

Revocation of Wills

Wills and devises are ambulatory till y^e testator's death. i.e. they are are not consummated, and ergo revocable by y^e Testator. 4 Burr. 2512. Pow 550 -

Revocations may be considered under 2 general views - First as they stand at C Law, i.e. ante y^e Eng St of frauds, and Second, as they stand under y^e Statute -

Revocations at C Law are express or implied.

Express revocations at C Law might be by writing or by Parol, Pow 532 -
In writing, as by a codicil or subsequent will expressly revoking a former. - As By Parol, as one having made a devise, says, Cro J. 115 -
"I will revoke my will" or uses words of similar import. 497.
Pow 533 652.

But in these cases it must be clear, y^t y^e words, were made animo revocandi, ergo where y^e Devisee said, quia y^e Devisee did not visit him, he shd not have y^e land, making no express reference to y^e devise, y^e devise was not revoked - Cro Ch. 51. Cro J. 115.

So words importing an intention to revoke in future, don't work a revocation^{even} at C Law - As my "will shall not stand" Cro Elvi 306. 497.
or "I will alter it" They don't now by St, Pow 533. 34 -

2 East 488.95 The same rule holds, since y ^{if} of a similar expression, in writing, as if he write yt he will revoke post

Secondly -

Implied
Revocation

Secondly revocation at Law, may be implied an implied revocation, is by some declaration (not expressly revoking) or some act furnishing y ground to presume yt y Testator's intent to devise is changed, here y revocation is termed implied or a revocation in law - Pow 532.34.35-

1. Selwini 73-
1. Pab 253,

As to a declaration of y Testator, amounting to an implied revocation it may be thus, A having devised to B & C a stranger, says "amino testandi" "my son shall be my heir"

Pow 535.54.

As to acts of deviser amounting to an implied revocation, they & may be by writing (impliedly manifesting an intention to revoke) or in Pais. 12. by acts contradistinguished from written instrumts -

By matter in Pais, is sometimes meant any matter not of record

3 Wils 511.12.
3 Mod 205

And first by writing - as if one having made a devise, post makes another inconsistent with, but not expressly revoking - it is a revocation. Thus if one devise his land to A and by a subsequent will to B, or if he first devise his estate to two, and post to one of ym -

reversion

Belveston 269-16.

Co Elvi 9-

3 Buls. 105-

1. Ponth 444-

2. atts 374.5-

y Mod. 522.

1. Vern. 30-

Co Litt 113. a

3 Atts 493

It is said however yt if one devise land to A, and in a subsequent part of y same instrumt, devise y same land to B. A and B take jointly.

Red Quere and vide Contra Co Litt 112. B. 2 atts 374-

The more numerous opinions however, appear to be in favour of y Rule. still in y case of a specific legacy, as of a horse, y latter bequest revokes y former, In all these cases y question was is merely what was y intention. 2 atts 375- Secus how ed y case it differ from y former.

If a gives a Chattel to one in one will, and to another in another - the latter will take y whole.

But a subsequent devise, (not containing express words of revocation) does not revoke a former one, nor inconsistent with it. Therefore y mere fact yt a later devise exists, (tho found by a Jury) will not warrant a Ct in deciding yt y former one is revoked. I by it. For y latter may relate to a different subject matter, or it may confirm y former. 2. 3. 93.

3 Mod 263-
2 Bb. R 937.
3 Mills 497-
Salk 592-
Cumbach 90-
Pow 536-

And tho' it is expressly found yt y second is different from y first, yet if it is not ascertained in what y difference consists, in wh case no repugnancy can appear, y first is not revoked +

2. 3. 93.
3 Mills 497.
2 Bb. R 937.
Cow 87-

2 East 488+

But if it were found yt y second devise was inconsistent with y first or y disposition made in y first, y second, it appears, wd be a revocation -

Pow 540-44-
544

There is as y case may be, y difference was found to be total. for how cd y Ct seeus know, yt y difference extended to any one part of y devise, yt was made first? And also is such a general conclusion found by y Jury of any effect. It may consist entirely of matter of law, it must also necessarily involve some matter of legal construction - and y Ct can't know y grounds of y conclusion - I should thinkes y Rule incorrect -

To a codicil inconsistent with a preceding devise, to wch it is annexed, works a revocation - as in a devise of B A ere to A and by a subsequent codicil giving white Acre to A - B A is given to B.

552.
3 after 552

1. Vesy 32- Pow. 541-42-

But a distinction is taken between y revoking effect of a codicil and yt of a subsequent will, viz yt a codicil being part of y will and not in its own nature intended as an instrument of revocation, does not revoke, nor precisely in y degree expressed -

1. Ves 187-
Pow. 543-

Does 176. 186-
 Pontblanc 444-
 Pow 544. 45-

Thus in a devise of lands to 3 trustees, to charitable use, by a codicil it is devised on y same trust to 5. 1E to y same 3. and 2 others. The trust ant revoked, as to y only effect of y codicil was to modify y authority originally given to three, by vesting it in 5.

Whereas it is said by Powell, y a subsequent will or devise, varying a disposition made in a former one, is a total revocation, thus if in y last case, y provisions in y codicil had been in a separate will, y former wd have been revoked, and y whole trust wd have depended on y last instrument - 1E. total as to y subject or rather y interest to wch y alteration extends, - not necessarily to y whole instrument. ^{But} in y case where one devised land in fee to his son and by a subsequent devise gave y same land to his wife - for life -

The distinction however amts only to y. That a subsequent will revokes a former one by substituting a new disposition for y former one. Whereas a codicil regularly only qualifies y original one. The practical difference, then it seems, consists in y latter case, chiefly in y mode of pleading y devise - It wd be, in y first case, it wd be pled pleaded, y 3. claimed under y will and y two other 2 under y Codicil y 5 derived

or power under y one make a second devise inconsistent with a former one, under a false impression as to y matter of fact wch furnished y motives to ^{make} ~~revoked~~ a second, if it appear, in y second will, and y supposed fact after his death, is found not to exist y first is not revoked, as where one devises land to A and post by another instrument reciting y A is dead, devises to B. If A is alive, he will take - vide P. 107.

Pow 546.

So if y second devise is to B, called in y instrument, y devised's wife, and it is found y she then had a former husband living (y testator being ignorant of y fact) y first devise wd not be revoked ^{second} Ibid -

A false impression will not avoid y^{first} devise, ni it is y consequence of deceit practiced upon y Testator, Pow 546. 7-

Quere for no actual deceit. i.e. no wilful misrepresentation is supposed in his first example - He seems from y example to mean no wilful misrepresentation: by deceit, - nothing more y^m misinformation and consequent misapprehension as to y matter of fact - He seems to have used deceit, for deception, wh latter may exist without fraud - I y case he distinguishes from y case of deceit, is one, where y misapprehension is of matter of law only - It being doubtful k^{at} y rules of law or Equity I may devise my estate to y separate use and ergo &c, Pow 547 - and in y^s case. Pow supposes y second devise good -

If a former devise is revoked by a subsequent one, merely Perk. 9. 4. 79 on y principle of y latter is inconsistent with y former, & Burr 2512 - y revocation itself, i.e. y revoking effect of y latter instrum^t, Perk. Sec 4. 79. as well as y instrum^t itself is ambulatory, till y Testator's death. Therefore y latter being revoked, y former stands - Pow. 549 -

But it seems if y second expressly revokes y former, & revocation of y second don't re-establish y first, even tho' Cow 53 - y first remains in existence Pow 551-54 - Doug 43, because Doug 40 - y revocation being express is an independent act, (not 2 Dall 266 - depending for its effect on y continuance or consumation 3 Connt 576. of y second instrum^t | by wh y former becomes immediately Pow. 551. & void - Its operation becomes analogous to y^t of a release 554. 3 Connt 576. of a bond or of an instrum^t revoking a power, 4 Burr 122 2572 - Cowp 92 - I Quere - 4. Burr 512 -

Secondly - Acts amounting to an implied revocation, may be by matter in Pais Pow 554-532-565

As first by a total subsequent alteration in y relative & domestic circumstances of y Devisor -

Second by a subsequent actual, or intended (rather attempted) alteration in y Estate devised,

Pow 554-65-

First no alteration in y Devisor's relative circumstances, ni y^t of a subsequent marriage, and y birth of a child has as yet been decided, to be a revocation of a devise previously made - y Devisor being a male, such an alteration of circumstances is *prima facie* a revocation - Quere under special circumstances,

5 Ves In 663- Pow 554-4 Burn 2171-2182-

1. P^{ms} 304- 1. Eqt^y Cas abt. 413- Doug 35-

Stalk 292- 2d Raym^d 441- & Ab 376-

1. Wils 243- 1. Ves 191- C

5506.49.

So tho' y child born posthumous 5506.54.49-
IE. if Devisor marries, and dies, and post a child is born -

Every presumption de facto may be rebutted -
Tho' y presumptions of law cannot -

216

It subsequent marriage only, or y subsequent birth of a child only
is not satis de revoke a devise.

The rule however holds in favour of a posthumous child
ul Supra 5 TR 6. 49.

In y State by a late St, y subsequent birth of a child, is a
a revocation of a devise, if y will don't provide for
such a contingency.

The reason of y Law Rule, is said to be, yt from such a
change in his domestic circumstances, y Testator is presumed to have
changed his mind. - Day 31- Pow 556. 9- Doug 31-
557.

But to rebut y presumption, any evi written or parol
is admissible to show, yt y Testator hadn't changed his mind.

Pow 556. 9- 1. Eqty C 413- Doug 31. 5- 2 East 530- 2 H R 6

532- 1. Ld Id Haym'd 432-441- 2 East 543-44- &

522

5. Res In 448. 654-
64-

This presumption of a change of intention, don't appear to satisfy
any cases, for in y case of a subsequent marriage and birth
and birth of a posthumous child, y will is revoked. 5 TR 358. 9,
This rule has been doubted. 2 Res In 448- 664- Parol
Evi an't admitted to qualify y will, but to give effect to it
and to rebut a presumption arising from extrinsic facts.

Ld Kenyon, says y force ground, is yt there is a tacit
condition annexed in y mind of y Testator to every devise, yt
in such cases, y devise shall not take effect. 5 TR 58-63- ^{circumstances}

2 East 551- 2 East 1. 5 TR 558-59-
542. 1.

where there is a change in circumstances.

There has been no case decided, where y two subsequent events
of marriage and birth of a child have amounted to a revocation,
in y whole estate of y Testator was devised away. 2 East
541-2, Pow 340. 56. 7. 1. Eqty C 413-

It seems also yt if y wife and child are duly provided for,
either by y devise itself, or by his dying intestate as to part of
his estate, y devise is ^{not} revoked. Doug 38- Pow 556- 7-
Pow 560

1 Eqty C 413
413.

And clearly y subsequent marriage and birth of a child, will not revoke a devise made in contemplation of those events and making provision for ym - Doug 39- 2 East 530

All these rules contemplate a devise made by a Male -

Rodolph 29-
2. JRe. 682
arguendo

4 Burr
2517-

§9. thinks
it will
revert
on her husband's
death -

But if a Female having made a devise of her estate, post nuptial, y act of marriage is clearly a suspension of y devise during coverture, so yt if she die before her husband, y devise can't take effect, for it's an essential requisite, yt it be in y testator's power to confirm or revoke it at his death - 4 Co 61- 1. Bac. 291- 4 Ves. Jrn 160- Pow 563-64- Plow, 343- 1. Bac Abr. 281- 2 Pol. 492 note. 2. JRe 582. Hus et Wife 75-

~~Refers~~

+

But if y wife in y case survive her husband, & y devise be "in fee" and y estate is confirmed by a husband and wife, it is a valid - Plow 343- Pow 563-4- contra 3. JRe 2513-

Gold thinks it valid & quere. see Infor In y state, & question can never arise, or under our law, she may live during coverture into 35-

See there now, for it has been decided, yt a Female can't part with her estate as a feme sole.

1 Ber. 105.
Pow. 564.5.
25723-

An alteration in y natural capacity of y testator, tho' it be such as renders him incapable of either making or revoking, don't revoke y former, for there can be no presumed change of intention, nor is there ground to apply y original condition - 4 Co 61. a b. 1. Eg Co- 234 or 3-

In all these cases, y intention shall govern -

+

Quere don't y same reasoning apply in y case of coverture? For her devise can't be revoked on y ground of a change in her personal circumstances, if want of legal capacity -

Secondly

Alterations

in y

A devise may be revoked by an actual or attempted alteration in y estate devised - our books say intended.

Estate devised

First, of an actual alteration, in y case, y revocation is y consequence of a positive rule of law - y intention of y testator

not regarded, not founded on any presumed change of intention.

2. *Mas* 579. 1. *Bos et P.* 594. *Pow.* 585. 582. 607. 6.

Effect of a revocation affected by an intended alteration.

1. *Roll* 615

The positive rule or principle referred to, is *qz*. That as *y* devisor must be seized (at *y* inception of *y* devise) of *y* estate devised, so *y* Estate must remain in *y* same plight, till its consumation, i.e. it must in contemplation of law, have been in his seisin, and remained so ut Supra.

Pow 184. 6. 566. 611. 1. *Ret Tull* 576. 376.

1. *NR* 401-

Hence an alteration in *y* estate, between *y* inception and consumation of *y* devise, wh puts it in a different plight, works an implied revocation. Such alteration in *y* estate may be by devisor's or act of a stranger, or by *y* act of *y* law. 1. *Ret Tull* 576. 399.

2. *Hen RB* 516.

First by act of *y* devisor - as sale of land devised to a 3^d person will revoke *y* devise.

So if *y* Testator having an absolute estate in lands, makes an alteration in *y* legal Estate only, retaining *y* beneficial interest; (or equitable Estate,) it revokes a prior devise of *y* land. As one having devised land, makes a feofmt of it to a stranger, to *y* use of himself in fee, Devise revoked - for he holds *y* estate by a new limitation, as a new purchaser.

1. *Roll* 515. 1. *Pow* 56, - 1. *Ret* 511. 576.

Ret 599. 6. 2. *Reg In* 417. 7. *J Re* 399. 1. *Ret* 570.

1. *Show* 92.3-

So if one having devised land, conveys it in fee, and then takes a reconveyance of *y* same land, it is revoked - a devise can't operate on lands post purchase. 1. *Ret* 576. 8. *Co* 90. 1. *Roll* 516.

Dyer 143-

The rule is *y* same, tho *y* conveyance is by lease, and release, in wh case *y* actual possession, or seisin is not changed.

So where one having devised land, made a marriage settlement, remainder to his own right heirs, 1. *Ret* 440. 7. *J Re* 399.

So a recovery of land suffered to *y* use of *y* Testator, will revoke a

2. Atk 325
3. Mils 6-
2. N Ro 401-

a fori devise of y same land - , for he takes by a new limitation -

2. Atk 741
579
863

The preceding rule applies as well to equitable as to legal Estates, as if y Mor having devised his Equity of redemption, conveys it in trust for himself, y devise is revoked - , for he holds under a new limitation - 1. Eq Es 411. 4 Burr. 1961- Pow 572.3- Contra Doug 572.

3. Ser
3. P 1m
3 Ser 108-
3 P mms 163-
2. H Ro 523-
2 J Ro 406-
2. N Ro 401-
2. Hen 33-
2. J R
2. N Ro.

An Alteration in y estate devised, will operate as a revocation, tho' y alteration made be necessary to give effect to y devise - A tenant in tail having devised, conveys to S & D, for y purpose of having a recovery suffered to y use of himself in fee, the recovery is ~~sates~~ ^{offered} but y devise is revoked -

3
3 P mms 170-
Gaik 341-
Pow 581-

So if a man covenants to levy a fine to y use of such persons - as he shall name in his will, and makes a will, and then levy a fine in performance of his covenant, y will is revoked -

For in y case, y fine can't relate to y covenant, y latter being no part of y conveyance, but a mere covenant to convey in future, y devise is made not by any person claiming y equitable interest under y Covenant, but of y legal estate by y covenantor himself,

So Note y difference between y case, and yt of a conveyance to suffer a recovery -

2 Atk 573-
2 J Ro 687-
7. Do 399-
1. Roll 614-

And y rule is y same, tho' y alteration ^{subseqnt} made is expressly declared to be done for y purpose of giving effect to y devise, provided y Devisor is entitled as of a new purchase, Thus where one made his devise of a Manor, and then made feofmt to y use of such persons as he shd declare by his will bearing date, The feofmt was adjudged a revocation

reference of y feofmt to y devise gave it effect, yt operating as a republication -

3 Atk 803. 4- Still farther if a man cove in fee, but supposing y se has only 2. Ro 523- an Estate Tail, suffers a recovery to conform his will, it is ~~not~~ ^{prior} revoked - Pow 582.3-

And as specific devise of a lease for lives, is revoked by a subsequent 2 Ves 418
surrender and renewal of it. 1. P Wms 575. 2 Do 168-3 Do 163-
2. Atk 593. Pre Chy 319. 2 Bern 209. Pow 586-
Pow 586

Can there be as to y point of revocation, any difference between
a specific and general devise, where y interest is a freehold?

And y rule is y same as to leases for yrs, wh are revocable - As
one devises a lease holder of A and post surrenders and takes
a new lease of y same land -

For y interest specifically devised is annihilated by y surrender,
and y terms of a specific devise don't include y new interest, y
case however don't depend upon y same principle with y preceding ones.
But on y ground yt a new lease ant within y terms of y will -

But leases for yrs being chattel interests, may pass by devise,
namely a subsequent renewal, if proper words are used for yt
purpose - As I devise all y estate etc I have in such a lease,
at my death, subsequent renewal don't revoke -

Satt R 237. 1. P Wms 573. Pow 589-90 -

So if y renewed lease is not complete at y Testator's death,
y devise is not revoked by y surrender, as where Lessors seal
wasnt affixed till post y Testator's death, no revocation.

But y rule holds only in Chy - G & says -

And where y revocation depends on y simple fact of an alteration 615.
in y estate (independantly of any supposed intention to revoke), there 1. Atk 613
must be an actual and substantial alteration, or no revocation. 1. Atk 613
349.

Thus olim holden if one devised land in fee and post converted
to convey to a stranger, devise was not revoked by y stranger -

1. P So now at Law -

But as of Equity
But its now considers an executory agreement to convey land,
as an actual conveyance, such a covenant or agreement will
in Equity be deemed a revocation, if covenantor has a right
to specific performance - 2 P Wms 329- Pow 494-95
624-

- But a devise of an equitable interest in a trust estate is not revoked by a change of Trustees, as *Easton Que Trust* having decided, causes his trustees to enjoin other Trustees to name new - no revocation in Equity - No alteration of thing devised i.e. of equitable estate, the legal interest is changed -
(See Page 127 - This wd take at Law -

- if one having conveyed by action for a future purchase of lands devises it and then ~~conveys~~ ^{completes} a purchase, yet is in Equity, no revocation - the equitable interest isn't altered - is only taking legal estate home - In both of above cases, Equity will enforce and support a devise -

Eng. 684.91-
Pow. 596.98-
Eng 710-

To if one having devised says also a debt, or conveys legal estate to a Trustee for mortg., & ant no revocation -

- is laid down as a general rule, if one having an equitable interest in fee, devised it and then takes a conveyance of legal estate, a devise isn't revoked - No alteration in legal estate devised, i.e. of equitable estate -

1. Mils 311-
3. P. M. 170-
2. Bern. 679-
7. J. R. 417. n.

When several instruments taken together, constitute but one devise or conveyance, a devise made in an intervening time between a conveyance executory of a first and completion of a last, is not revoked - for all parties have relation take effect by relation from the first instrument - as conveyance to original made to suffer a recovery and then a devise post a recovery is act. completed - 1. Bb. l. 251. 2. Burr. 1131. 4. Do 1962. 1. Bb. R. 706. 605-
Pow. 600-

- A partition between tenants in Common or Coparceners, if confined to its object, is no revocation of a previous devise - by one of them - not an alteration in a Devisor's estate - it merely ascertains what before belonged to him - Con 3 Feb. 357. 1. Felum 90-

Ray 240
3. P. M. 170-
note B.

- But if a deed of partition extend to any other object, you get a partition merely, it will revoke a previous devise, as if

1. Mils 300-
3. Atkes 742.
745
30

contains any further disposition of y estate.

211

Note where one has made an actual alteration in an estate before devised, no parol Evi is admissible to show, yt he didn't 2 H Bl. intend to revoke - For y revocation can't founded on a supposed 576- intent to revoke, tis an arbitrary conclusion from positive law - 3 atts 741- 2 Res In presumptis juris de jure - and a conclusion of law can't be 417-598 rebutted - 595- Pow. 606-

Secondly - acts in pais amounting to an implied revocation of a prior devise may be by Intended ^{1E} Alteration - in y Estate Altered devised, as if y Devisor attempts a disposition wh is ineffectual ⁶⁰⁵ either for want of formalities, or of capacity to take in y person ⁶⁰⁰⁻⁰⁵ to whom E3C Tens of a subsequent ineffectual devise of y same subject under y revoking clause of St 29 Ch. 2 - For yt don't 1. Res. attempt a change in y estate to take place between y inception 187. 8- and consummation of y devise - The intention to revoke, is therefore conditional, 1E depending upon y substituted condition disposition, ^{Popham 108-} taking place or effect - As one having devised land, makes a 1. Roll 615- deed of feoffment of it with livery of Seisin, or having made 3 atts 72. 3- a revocation, make a grant of it, but y tenant never attorn. 803- or having devised, conveys by deed of bargain and sale 1. Bl. Re 349- not enrolled within 6 months -

Principle it shows y testator didn't intend y will to stand - But only prima facie revoked
or such attempts to convey, imply an intent to revoke

Revocations thus effected being founded upon a presumed intent to revoke, y inference may be rebutted by parol Evi - As when Devisor on executing a deed of feoffment to his own uses E3C declared his intent not to revoke - ² ^{When 76-} ^{Pow. 607. 8- 608-}

So by an intended alteration, wh becomes ineffectual, thrs an incapacity to take in y person - As where one having devised to a. post 2. Eq. Cs 359- devises to a corporation, ys is a revocation, thrs y corporation can't take - 9 mod 190- 10. do 37-

1. Roll 615

So of a subseqt ineffectual grant to one, who can't take, its grant of devisors whole estate to his wife, who by law can't take by grant from her husband - At Law, it wd make no difference, an y grant were of y whole or part merely - but in Equity a grant of a reasonable portion of y husband's estate by way of provision for y wife, wd be supported. In such case, there wd be an absolute revocation quoad yt part,

So an alteration in y estate devised working a revocation, may be by y act of a stranger - As if one having devised is disseised before^{re} entry - he dies -

1. Roll 616 - 416. Pow 184. 566. 611-

Pow 674-

But a stranger can't revoke a devise by tearing or cancelling it, if it remains legible, suppose it was not legible, but y contents known and provable. Ruled in Court when y testator destroyed y will, being insane, Parol Evi might be allowed to prove its contents -

2. Ber 441. Pow 412. 642-

3. Barnell and Olston 189-

An alteration in y estate devised amounting to a revocation, may be by mere operation of law - as devise made but not consummated, before y St of uses was revoked by y St.

A devise may be revoked absolutely or conditionally in whole or in part only - Absolute and total revocations have been already considered.

Conditional & partial revocations -

A mortgage in fee, tho at C Law an absolute revocation of a prior devise, is now considered in Equity as only a conditional revocation

1. Roll 617 - "pro tanto," i.e. in y amt of y debt secured ^{insured} So yt if devisee will pay y debt, he may take y land - for a mortgage is regarded in Equity as a mere pledge of y legal title by way of security for a debt, outlasting most interest (even under a mortgage in fee) as personal estate.

3 Affk 748
805-
968

Title Mortg 12. 20. 54. 23-

So is no alteration of y freehold

So if y subsequent disposition were an absolute conveyance to a creditor, 148,
 yt he might sell y land to satisfy y debts, and account with y altho in 28.
 y testator for y surplus. Revocation in Equity wd be only pro tanto, 272.
 For y conveyance, altho absolute in form is substantially but a pledge, Pre Eny
 and y interest of y creditor is regarded in Equity as personal, 32-
 y residuary beneficial interest in y fee, remains therefore in y Devisor,
 so yt in y case also, y freehold as to y beneficial interest is not 2 Bern
 changed - tis substantially like a mere power to sell and account - 241-
 1. Eqty Co 410- 344- 344-

But if y land was actually sold by y Grantor²⁰ before y testator's
 death, it wd doubtless be a revocation - wd y devisee be entitled
 to y surplus of y proceeds?

not
 But a mortgage for yrs only, is even at Law only a revocation 3 altho
 of a devise in fee, for by y term^{only} y reversion passes. In Equity, it is 748-
 only a conditional revocation "pro tanto" so gr y devisee may take 750-
 immediately on paying y debt. That was y rule in Equity some 410-
 by now corrected by Lord Eldon. Pow 617-

But a mortgage, an in fee or for yrs is an absolute revocation 3rd in
 as well at Equity as law, of a prior devise made to y devisee, 750-
 Devise and mortgage are inconsistent - same person Mor. and 600
 mee - Proc Chy 7. 514- Pow. 618-19-
 There are y latter y better opinion: y former seems quite artificial,
 and tends, I G. thinks to defeat y intention of y Devisor -

Revocations pro tanto, may operate by demissionem either y quantity
 of interest, or y subject matter devised -

First Thus if one devise in fee, and post lease to a stranger for life 60
 a devise is revoked only curia y estate for life .i.e. during y life 624-1-
 of y lessee, not as to y fee. So far only is y latter devise inconsistent
 with y former. 1. Roll 618- it

So if one devise an estate on condition and post by a subsequent
 instrument make a devise of y same land to a in Tail, y second
 devise is a revocation of y former to y extent of y difference between y inc.
 A takes an estate Tail - Cow 90- Pow 624-6-

devisors
death.

But tho' a lease for a stranger is only a revocation - pro tanto
of a former devise, (but Supra) yet lease to devisee of land
devisee the commence from ^{devisor's} death, is a total revocation -
Devise and lease inconsistent. Now ex G. Cro. 49. 5 b. In
600 - 3 Ex 41 - 400. Contra, B yet lease is no revocation,
so that term will pass under lease to exclusion of creditors,
and reversion under devise subject to ~~special~~ ^{special} debts -
The first rule now overruled by Ex Ld Eldon -

A Lease is no revocation, kata to Eldon -

But a lease to devisee to commence in devisors life time
is no revocation, for it may determine for y devisors death,
and so stand with y devise, and if it does not, it will only
revoke quoad y unexpired residue of y term at y devisors death.
And it according to y cases B et 4 b. In be any revocation?
will not y unexpired residue of y reversion be held, as in y
last case -

Second, as to revocations ^{terminating} ~~terminating~~ y subject matter, If
one devise 3 manors to A and then revoke as to one of ym,
y devise remains good as to y other two.

1. 2d 617 - He devises lands to his daughter, afterwards on his marriage
2. Ex 726 - settles a part of y same land upon her. The devise as to y residue
3. Ex 412 - remained -
- 2d 711 -
- 2d 208 -

Revocations under y Eng St of Frauds -

29. Charles 2^d

This St enacts yt no devise shall be revoked secus ym by some
other will or codicil in writing, or other writing declaring y same,
(or by burning, tearing, cancelling, or obliterating y same) or in y same
be attested by some other will or codicil, or by other writing, signed
in y presence of three witnesses, declaring y same &c. note y requisites
in y drawing clause -

Holden yt y clause of y St extends not only to devises of land
and reversion, but also to legacies or sums of money charged upon y
land, both to be revoked in y same way -

It don't affect invalid revocations, y^t is, such as are affected by a subsequent inconsistent disposition, marriage and birth of a child, &c. It relates to express revocations only. The former remains as at C^t Law and it don't abrogate y^e rule of C^t Law, as to subsequent, ineffectual attempts to affect an alteration in y^e Estate devised -

Revocations under y^e Stth, may be by some other will, &c
 as prescribed in y^e first branch of y^e revoking clause, ^{or} by burning ^{or} other
 writing ^{as prescribed in y^e 2^d branch} _{3^d}

In pointing out y^e first modes of revocation, y^e Stth seems to be only declaratory of y^e C^t Law - in y^t y^e words, "will or codicil" in y^e first branch of y^e revoking clause, are construed to mean such a will or codicil, as wd be satis. to pass lands within y^e prior devising clause. / Pow 48-7.

For after y^e devising clause, a will of land not complying with it, wd be void, and ergo not a will of land - Pow 632 -

Whereas y^e Instrument contemplated by y^e last branch, not being referred in either construction to y^e words "will" &c in y^e devising clause, is construed to mean an instrument of revocation merely - ergo not requiring y^e solemnities required in y^e devising clause, for y^e last branch of y^e revoking clause not only don't prescribe y^e same requisites, as y^e devising clause does but does expressly prescribe diff^t ^{requisites} ~~requisites~~ and different ones ab^t only; and for y^e reason, it can't contemplate a devising instrument (or one conforming to y^e devising clause) and must of course contemplate a revoking instrument only, i^e. y^t y^e witness sh^d subscribe in y^e testator's presence, y^t y^e testator sh^d sign in y^e presence of witnesses.

Hence a distinction between an instrument, intended merely to revoke a prior devise, and one intended to make a new disposition of y^e same land and also to revoke -

The former, i.e. one intended merely to revoke, will be effectual if it comply with y requisites prescribed, either in y devising clause, or with those prescribed in y 3^d branch of y revoking clause - note y requisites.

or if it comply with y requisites in y devising clause, it is effectual according to y first branch of y revoking clause.

And if it is attended with y requisites in y 3^d branch of y revoking clause, it is good kata to yt clause -

But e Contra if y latter instrument is intended to be a disposing and revoking instrument, it will not be affect^{ual}, ni it conform to y devising clause - 18. attested in y testator's presence, for y intention is to give to y second devisee, what is taken from y first. or rather to take from y first only what is given to y second -

Case 683.
3-9-

But nothing is given to y second, ni y devising clause is complied with, therefore nothing is taken from y first, y first devise remains in force - 3 Mod 258 - Carr 73 - 1 P Wms 343 - 2 Bro Cts 542 - 2 Wms 41 - 1 Eq 340.

The result then of y preceding rule is, yt if deviser intends a new revoking instrument, he may make it effectual, by complying with y requisites prescribed either in y first or third branch of y revoking clause - But if he wd make both a disposing and revoking instrument - or if he wd revoke it by making a new and different disposition of y property (under devise) he can't effect his object with- out complying with y requisites impliedly prescribed in y first branch of y revoking clause, i.e. with those of y devising clause -

But a devise in y testator's heir at Law, tho' void as a disposing instrument (as he takes by descent) will if duly executed as such revoke a former devise - For y requisites of y it being complied with y revoking effect of y instrument must prevail -

1. des 117 -

235

But a disposing and revoking instrument need not comply with
y requisites of both clauses, if it conforms to y devising clause, y
revoking words are effectual within y first branch of y revoking
clause - Indeed if good as a disposing instrument, it wd be effectual to
revoke (impliedly) wtht words of revocation. I.E. it wd revoke as at
C Law, as a subsequent disposition inconsistent with y former one

Secondly way - is not within y It of Statutes, I.E. implied, not express -
1. As to revocations by burning, cancelling, tearing and obliterating;
Revocations thus effected remain^{as} at C Law. To effect a revocation
in either of these ways, it is necessary y y burning be by y testator,
or in his presence, or by his direction, - Sees no revocation,
I.E. if it remains intelligible. Intelligible intelligible

Suppose y devise destroyed, May y contents be proved, & no such
case I believe, note y analogy to deeds, lost or destroyed by time
or accident -

Revocations affected by these acts, are in y nature of implied
revocations, at C Law - Hence y acts, themselves (tho done by y testator)
are not considered per se as revocations, but as furnishing
Evi of a revoking intent - outward or visible signs of such intent -

Course they amt to revocations, or not, as they are done or not
"animo revocandi" Thus if y testator thd throw ink instead of sand, 163 -
on his devise, or having y. thd by mistake, cancel y latter instead
of y former, there wd be no revocation - Cow 52. 1. 3 Wms 346.

3. Wils 588. 4 Burr 2515. Pow 63. 4 =

But it aint necessary y y devise be totally destroyed, y slightest
tearing will be a revocation if accompanied with a declared intent, 1043. 2 B. & C. 1043.
to revoke, as where one slightly tore his devise and threw it into Pow. 635. 6 -
y fire, but it fell off and was taken up, but he declared y it thd 164
not be his will -

So if there are duplicates of a devise, and testator tears one part
"animo revocandi", y other is revoked, for both parts constitute
but one devise

Pre Chy 460-61-

Coryno B. 433. 1. P. Wms 346. 2 Bern. 742. Cow 49-

Where acts for yr effect ^{depend} upon y testator's intention, ^{they} and in some instances only the 'dependant relative' revocation, i.e. when done with reference to another act intended to effect a new disposition, yr revoking effect depends on y efficacy of y act to be done.

^{Pow} Pow 638-
4th Bun. 2515-
Comyns Re. 452
1. Eq. Cs 409-
1. P. Wms 343-
2. 2^d Eq. Cs 770-
Thus where one thinking a new devise of his estate, was completed, when it was not, tore off y seals from y first devise, and on being informed secus, desisted, and said, "he was sorry" and never completed his subsequent devise - y first was not revoked - Note y analogy to y case of a disposing and revoking will. Here y parol Ev. went only to rebut y presumption arising from y extrinsic fact of tearing off y seals -

Con. 812.
166-
A will obliterated in part by y testator "animo revocandi" may be good as to y rest, Thus where one having devised all his estate to A. in fee, afterwards struck out y exception, y part not obliterated ^{se} remained good -

An instrument made under y revoking clause of y St is not valid, tho' testator's signature is on y face of y instrument, ni it was intended to authenticate y revoking part -

Parol
revocation
was goods
before St
- of Grants
L. by Parol
it might be
revived -
The St in Comt on y subject. The rules of y C. Law generally apply here - Quere as to revocation by parol, ante 121. ni it was goods not be proper to apply y rule of C. Law - there being no St regulation on y subject. in relation to deeds, That every - of Grants instrument must be destroyed with y same solemnity. with wh it was created -

Republication

167.
A devise tho' revoked, if not actually destroyed, ^{may} be revived by a subsequent republication, for being ambulatory till testator's death, it may as well be revived as revoked - Pow 652 -

II of Republications as at C Law - II as they stand since
It of frauds and perjuries -

At C Law. republication, were much favoured, & course very
right none we elect a republication

168.

Thus if one having made a devise of his land and purchase
other land, and then deliver his will as "his will" or verbally
declare it was his will, it wd be republished and y land
so purchased wd pass by it - 1. Roll 678.

Dyer 143. a. b.
2 Prover 4
Pow. 653 -
654.5
655. 55

1 Roll 617 - Cro Elr 493. 2 Bern 299. 1. P. 264 -

So if one having devised all his land to his executor, and
poss. purchase other lands, shd be applied to, to sell y lands,
shd reply - "No" they shall go with my other estate lands
to my executor, y devise wd be republished, and wd then pass
y lands thus purchased -

and huta "one report of y case cited from 2 Chy reports,
y Justices saying (on y application) ut supra) "My will is
in a box in my study -" was holden satis -

As these words, "My will in y hands of J. L. shall stand,
have been holden satis -

So any act subsequent to y revocation of a devise and showing
an intent yt it shd remain, wd amount to a republication -

As delivering it to one in token of such intent -

1. Roll 617 -
Pow. 655.

So tho' a subsequent feofment to y use of feofors wife, was
holden to be a revocation, yet y reference of feofment to y devise
was holden to be a revocation, and thus to give it effect to y devise -
(vide Page 142. ante) Post republication Corp 130 -

But y subsequent appointment of ^{new} executors, and giving of a legacy
was holden to be no republication of a devise of land - 170 -

Yet it has been holden, yt a mere addition of a codicil,
taking no notice of y devise, be a republication at C Law -

3. attes 180. 3. P. mms 168. 2. Bern. 209. Pow. 584. 657 -

Contra Cro Elr 493 - 1. Roll 618 - 1. E. & C 305 -

Because y very act shows yt y Testator contemplated y devise as then subsisting -

But y better opinion seems, yt y mere addition of a codicil or y execution of one not actually annexed by 'no' it relate to personal property, only, will amount to a republication, or a devise - ^{as it is a further part of y last will} - an express to be so, or not, and ^{ergo} furnishes conclusive evi of y Testator's considering his will as existing - and being made in addition to it, is of course ^{affirmatory} of it, so far as it does not revoke -

At any rate, y annexing of a codicil, or y execution of one not annexed, if it expressly confirm y devise, will be a republication "as I ratify and confirm y foregoing will"

So it seems any words in y codicil showing an intention to confirm, will amt to a republication ^{in y devise} ^{as y devise} yt y existing may be a further part of my last will and testament -

Republications since y St of Frauds -

172.

neither y Eng St nor our own makes any express provision with respect to y republication of devises -

^{Pow}
Pow 80. 82. 664. 66.

Baradision 192.

1. Ber. 329 -

1. Polioni 162.

1. Bes - 440 -

9 Mod. 77 -

y

1. Bern. 329
Cromb 84.

But y effect of a republication is y same as yt of devising - It is holden, yt no codicil or writing can amount to a republication of a devise of land, ni it complies with forms provided in y St, & ni accompanied with y requisites of a devise - signed by y Testator and signed in his presence by 3. or more witnesses

Partial republication, then are at an end, for to republish is to devise - "No codicil" (says Pow), can amt to a republication, ni it complies with y forms & be signed and published by y Testator, in presence of three witnesses - Pow. 664. Comyns R. 381. 9 Mod 68 -

Cow. 166 -

Holt 748 - 2. 42 -

1. Bes. 440 -

173.

Quere must Testator sign in y presence of 3 witnesses?

ys is not necessary in y original devise. The case cited from Com don't warrant y position; then y codicil was thus executed, and holder good, but such execution was not adjudged necessary -

The codicil shd indeed be published in y presence of y witnesses Pow 664 - for caution sake at least. Sed Quere, Is y strictly necessary at Law? No not a publication in y presence of other witnesses, he sates, But why shd it be signed in y presence, ys not being required in y devising clause - of y It -

It has been decided in Comnt, yt a parol republication is not 174- good Supreme Ct aug 1800 - Superior Ct. Contra Rost 82.83 -

But y operation of y It does not extend to implied or constructive republications, as y revoking clause does not extend to implied revocations - as if a subsequent devise implies y, revoking a prior one, is itself revoked, y prior one if remaining, is good -

Powel says, yt it is a republication - Quere does y revocation give y will in effect, as a new date or republication does -

So devises of household estate are not affected by y It, 18. of terms for yrs. Not "land" so nor "real estate" under y It (as 1. ves 489 - at Law - no express words of confirmation are necessary, it seems, Pow 663. 64. 64. 68. 68 - in a codicil to republish a devise, sates if y devise is virtually confirmed - As I desire yt ys writing may be a farther part &c -

So also by y better opinion, every codicil to a devise, tho' not 175- actually annexed, and even tho' it dispose of personal property only, will amt to a republication, if executed kate y It -

As if one devises his real Estate and then merely executes a codicil giving pecuniary legacies, but executed kate y supra y reason is y same ut ante Pow 666. 1 ves 485. 1. Burr. 554. Comth 381 - 9 Mod 78. 7. TR. 484 - 3 Poms 168 - 1. ves In 486 - 7. 98 - Contra 3. Chy Reb - ¹⁴⁰90. d. c. 2. Vern. 621 - 1 ves. 489 - Pow. 679 - 81 - 668. 69 - Ambler 571 - - Page 171 -

176.

If one having devised in his will, and made more and considered you to be a real estate in your name, and a republication and a latter will made.

But here nothing is said of a son of a grand and its relatives, I suppose were not compelled with, but it seems to be an implied recognition. In such a republication is affected by a son.

The effect of a republication is to give a devise a new date, so if a devise is made such republication, it will comprehend all such property and all such persons, as if it had been made had it been originally made at a time of republication.

Cow. 130. 158-

2 J.R. 193-

4. Do 661-

1. Do- 204-

Where a devise not republished will extend to an estate which a testator had not at a time of making it.

vide P. 76-84-

1. Atkes 581-

1. P. Mms 400-

8. Mod 225-

Mills 297-

Salbot 44

General Rule, wills are to be construed with regard to the testator's intention at a time of making - a devise -

Cow. 493-

Comyns R. 381-

Dow. 674-

Since in one having devised in his will, and made more and then republished, a latter will made.

So if one having devised "all" his real estate, he purchases more land and then republishes - a whole will pass - Comyns R. 381-

1. Ves. 442. 7. J.R. 490 - 1. Do. 204-

So if one having devised to his son, A, who dies, and a testator post has another son of the same name - and then republishes, a latter will take.

1. P. Mms 275-

3. 3 Feb 847-

5. Co 68-

1. J.R. 193-

C.

So if one devises land to his daughter, "not to be subject to any control of her husband" (or having a husband) and post a husband's death, republished, taking notice of a husband's death, a restriction extends to any subsequent husband.

But effect of a republication extends no farther, gn to give y words of y devise, y same operation, wh they wd have had, if originally written at y time of republication - Pow 676.

Hence if one devise land called B Acre, and then purchases land called White Acre, and republishes, White Acre mont pass.

Pow 676. 84.

So if having devised all his land in A. he purchases other land in B. republishes, y latter will not pass.

Hence also words used in y original devise, as words of limitation, or can't by A republication, be made to operate as words of purchase or description - Thus if one devise to A and y heirs of his body, and post A's death republishes, A's issue can't ^{take} ~~issue~~ The republication being is of a devise in fee ^{tail} to A. (who is dead) 'tis a lapsed devise - in R. L.

Mod. 267. Cro Elvi 422. Raym 408, 4 T B 601. Prc Chy 439 - 2 Ver. 722 -

2. Do 313 -

2. P. mms 397. Doug. 337. 1. B Chy 219 - a -

So where one having devised land to his son A and given a legacy to his grandson B. C. republished post y son's death, it was decided yt y Grandson B. C. ed not take it not take y land - For Testator having used y word "Grandson" showed yt he didn't intend to designate his Grandson - by y word "son"

Note Testator's intention to be collected in general from a reference to y state of things existing at y time of making y will - not of his death -
at

A Codicil may republish a devise as to part of y subject matter only - as one having devised his real estate, he two, revoked it as to part of y Estate by settling y part of upon one of ym - and then by codicil confirmed it subject to y settlement, Holden yt y other part shd go to y two -

1 Burr 554, That a codicil can't give an original devise any inherent
 1 Burr. 554- validity, wh did not before belong to it. The effect is, to sett
 Comb. 174- it up in y same condition, in wh it was at its inception.
 Holt 742- Vade 3. 20. 27. Pages.
 2nd Chy 270- Hence if y devise itself ant executed under y st, a codicil
 2nd Vern. 587- can't be a true executed, will not pass it or confirm it.
 Earle 30

Ed Hardwick once said "bites" yf a man devise things
 "all y leases wh I now hold" and post renew y leases -
 those renewed won't pass by a republication.

188

181-

A devise may be republished by mere reexecution, and such
 republication may supply an original want of capacity in y
 deviser, as an infant makes a devise and post full age,
 reexecutes it. 1. Selwin 162. 1. Hble. 589. Pow. 686,

an infant may republish on y day on wh he come of age -
 and on y first moment of y day, there being no fraction of
 one in law -

nothing wh don't amt to a republication at Law, will amt
 to it in Equity -

Jurisdiction of Cts as to devises -

3 The ecclesiastical Cts of Eng have no jurisdiction over devises
 3 Feb. 30 of Land only - Pow 688. and a prohibition lies to prevent them
 1. Vent 207- from proceeding in y probate of devises -
 2nd East 557. 8-
 2nd Roll 315. a.

But now if y same instrument contain a devise of Land or a bequest
 of Chattels it may be proved in both Cts - 2 East 557. 58- 6. Co 28-

Pow. 688-9 For it is necessary as to Personal. But y probate is as to
 703-5: real Estate if no avail - not even at Law -
 Comb. 248- 2d Raym. 532. Talk 553. 3 Atk 546-

Ed

as to personal property it is conclusive, a
 prohibition was olim granted quoad y Land -

In Court devises as well as wills are proved by Ps of Probate - 3 Day 318 -
 but an appeal to y Supreme Ct lies from y decisions in all cases.
 If y sentence of y Probate is affirmed, no further proceeding is had, - if not,
 y cause is remitted to y Judge with directions, ^{from y Sub Ct} to conform to
 y decision of y ^{and a} Ct above -

And there is no need of appeal on any question of title to real
 estate, y sentence of a Ct is not Ev of title in such case.
 The law or devise may immediately sue at Law, any sentence
 of Probate taken - 184-

The division of an estate ~~estate~~ - Testate or intestate, under y
 order of Probate, settles y proportions of those entitled to it,
 unless it is shown on appeal to be erroneous, but has no
 effect upon y question of Title -

As Ct of law may not set aside ^{a devise} upon a suggestion of fraud
 in y making of it, for if y suggestion is true, to no devise -
 In it is or not, is a question of fact to be tried by a jury,
 on y Issue, "Devisavit & vel non" vide (infra)
 Contra 1 Eqy Cs. 400. 2. Do 421- 1.

Seems of a deed - fraud in y execution only, can be pleaded -
 This is similar to y "non est factum" pleaded to a deed - 3. atks 17-
 So an Testator was "compos mentis" or not is a question of fact to be tried at Law. 1. P. 1100.
 3. atks 554- of fact to be tried at Law. 2. atks 324. 424- 2. ves. 183- 548.
 P.M. 288- These belong ^{subra} 2 P.M. 270. 3 R.P.C. 358-
 Pow 693- Here if on an Issue, a "devisavit vel non" is sent out by
 and a verdict for y heir, does y Ct of Chy in such cases, 185-
 on y issues being found, proceed to set aside y devise (y will
 being trot for y purpose) or do y proceedings in Equity cease, 185

But there is a distinction between Chy setting aside a
 a devise for fraud, and its taking from y devisee y benefit

-1

1. P. M. 288-
2. Bern. 699. 707-
2

If a devise procured on a confidence, not binds his conscience -
The latter may be done, for here y existence of y devise is
not questioned, but y Ct decrees yt y devisee shall hold for
y benefit of y party aggrieved. The ground of y jurisdiction
is distinct from yt of y devise itself. It is over y conscience
of y devisee.

as If a agrees to give B 1000^{bank bills} \$ in ^{bank bills} bank notes in considⁿ
of B's devising land to him, and y bills are forged, A may
be made a Trustee for B's heir, for y breach of confidence
when Equity is a fraud -

Pre Chy 4 -
Pow. 697-98-

In a similar principle it is holden on y other hand, yt if
one being about to provide for his younger children by devise,
is dissuaded from doing it on y heir's doing it promising to
make y same provision for ym - y heir is compellable in Equity
to perform his agreement.

187.

and where one devised lands to be exchanged for college
lands for A, y College wd not exchange, Chy decrees
yt A shd have y lands intended to be exchanged -

3
3 P. M. 296-
Pow. 699

In general questions arising simply on y words of a devise
are to be decided at Law - But Chy may decide questions
of y kind, if there are circumstances requiring y interposition
of Chy -

3
3 P. M. 296-
188

Where y issue, "desavit vel non" is directed out of Chy,
yt Ct will mould y Ev, and direct y application of it,
so yt a fair investigation may not be impeded -

As y Ct may direct yt one of y parties shall produce
certain deeds or writings, yt he shall not set up such or
such an unconscientious defence - or yt he shall admit or Ev a

copy instead of y original devise -

Giving a devise in Eri at Law

The best proof of a devise, is y production of y Instrument, attended with
and regularly y best Eri is required in all cases - y proof of its
execution -

Ergo where one claiming under a devise, relies upon a bill
in Chy exhibited by y heir (y Def) & reciting y devise,
it was holden to be no Eri - 2. Feb 35. 71- 1. Do. 117-
Cumb 395. Pow. 702 -

So a devise exemplified under y great seal, is no Eri, to Cumber. 45-
a Purv in Ejectmt. - So a probate of y will in a Pow. 702-
spiritual Ct is no Eri as to a title to land. 1.89-

"As to Land, y proceedings are" Coram non iudice!" Cumb. 248- Pow 703-
see 182. 3

Hence y Probate of a will of land in yt Ct, is not Eri,
even if y will is lost. For such Probate is a nullity -
Pow 703. Ld Raym. 732-744. But yet it is said La Ray 744.
yt y Probate of a devise (ut Supra) accompanied with La Ray 732.44
other circumstantial Eri, is admissible, if y devise is proved Pow 703.6.7.
to be lost. Pow 706.7. But if neither of y parties has 707.
a right to y possession of y devise, a Copy is admissible -
Pow 705.6. Ld Raym. 735. Holt 298-25-

And it seems if a devise remains in Chy by order of y Ct, 190-
a Copy of it is admissible, for it is a roll of y Ct. Feb 117-
Indeed where y Ct in wh it is lodged has jurisdiction over y subject matter, a copy of it (ie an official Copy) may
be read. Gib Eri 74-

But if proof of y attestation is required, yt must be proved
by a subscribing witness, if either of ym is living - (Pow 708) 191
ys is a fact not provable in its nature by a copy - if there

has been a probate of y will in Chy, is not yt conclusive
Evi of y fact?

At Law, however one of y witnesses is satis to prove, what
all have attested, But he must be able to testify, not only
yt y Testator executed, and yt he signed in y Testator's presence,
but also yt others did y same. Seem he don't fully
prove y execution - On his thus testifying, y devise may be
read, 1. Pow 708 70. 718; 1. P. M. 741- 2 Sts 1234 - ante 28.
and tho y witnesses are all present, it is not necessary
yt they shd all testify to y fact of y testator's executing and
publishing - If it were, an obstinate witness, he might defeat
y devise - Pow 709. Skin 413. Holt 742. But if one
of y witnesses refuses to swear, it seems necessary to prove
y fact of his attestation - Ibid

Any subscribing witnesses are allowed to deny y facts, wh
from y face of y instrument, they appear to have attested,
as their own attestation - Testator's sanity - signing -
Gate once held Contra Pow 709-12. Skin 79 - 1. Bb.
R 365. 4 Burr 2224.

either may -

But y testimony of y subscribing witnesses ant conclusive,
re y devise, - If they shd deny even yr own subscription, the
Devisee might contradict it by other witnesses - Same as
to y testator's sanity, E3C,

1. B. & R. 365

4 Burr 2224 -

Ch. Evi 264 -

Pow 709-10. 11

Stran. 1096 -

P. 20-20

For y. It requires y attestation of witnesses merely as a solemnity
wh must attend y execution and publication of y Instrument.

194-

In y. other hand if yr Evi is in favour of y devisee, it ant
conclusive re y heir - He may contradict ym.

A Ct of Equity won't direct an issue to try y sanity of y Testator,
where y subscribing witnesses swear, yt he was sane, ni y.

297.

y suggestion to y Contrary is supported by some direct Evidence.

Proving a devise in Chancery

It is usual in Eng when a title to Real Estate depends upon a will, to prove it in Chy, especially if y will is of modern date. Pow 714. The probate of a devise in Chy is in effect conclusive upon all persons. It prevents its being disputed post even in a Ct of Law. For if y heir or any other shd post y decree, attempt to controvert it, Chy will issue an injunction vs him. Pow 718- 1. Wils 216.

In Court Chy has no concern with y probate of Wills and Devises.

But Chy won't decree a devise a devise proved, ni y heir is forthcoming 12. to be found. Pow 714- 2 alms 120-

It has been determined yt such a probate of a devise is not necessary in order to establish a particular claim, under it even in Equity Pow 715-

And tho' y heir voluntarily makes default, yet y devise - in Chy - won't be declared to be well proved. of course, proof must be made, as if it were contested -

The probate of a devise in Chy being thus conclusive, it is an invariable, established practice in Chy never to decree a devise proved, ni all y subscribing witnesses are examined - For y heir has a right to claim yt all of ym testify testify ante he is disinherited - 1. Wils 216. 1. bes. 177- vide Evi 84

Pow 718. 19-

And y Rule is y same in Eng, tho' one of y witnesses be beyond seas, His handwriting cant in yt case be proved, For it aint foreseen As be out of y power of y party claiming to obtain his Evidence

P. 28

195

3 alms 27-

Pow 718-

1. alms 27-

2. bes. 459-

174

174.

Where a commission issues from Chy to take deposition, to prove a devise, y devise itself is sometimes delivered out of y proper office, or security given, and in some instances Chy has ordered y Prerogative Ct to deliver it out on security -

A bill to perpetuate y testimony of witnesses, As y devise of a lunatic, will not be in his life time, The Lunatic may recover or revoke

In Comt, an appeal lies from y Ct of probate to y Supreme Ct. It is y practice of our Ct of probate to decree a devise or will proved on y oath of one witness - but an appeal lies from y s probate and there is another provision in our St - y witnesses swear before a private Magistrate at y time of making y will and he endorses y r attestation on y back of y will or devise -

P. 28 - - Evi 84 -

Fraudulent Conveyances
 Settlement after Marriage 315.
 When Agreement by Parol 316
 Settlement after Marriage without any
 former agreement 317. Purchasers
 with notice of Settlement 317.
 Disposition of Property by Women 320.
 Who can take advantage of the St.
 of Eliz 322. Voluntary Bonds 323.
 Badges of Fraud 327. ---

Fraudulent Conveyances

By y^e St 13 of Eliz and a like St in Connt, "all conveyances, Bonds, suits and judgments, executions & contracts made to defraud, ^{Roberts} y^e creditors of y^e Grantor, and vs those only who are intended to be defrauded, and y^e heirs, successors and assigns, are utterly void." 2.3-m.589-590.

Proviso in y^e Eng St, yt it shall not extend to any conveyance to any bona fide purchaser, having no notice of y^e fraud.

The proviso contemplates a conveyance by y^e debtor to such a purchaser and by consequence only a conveyance by y^e fraud of y^e Grantor to a similar purchaser - No such proviso in Connt, y^e proviso don't seem at all to alter y^e construction, but was inserted out of abundant caution. Supr. Rob. 4.2 Port 477-

The St 27, Eliz enacts, y^e - all conveyances &c made to defraud a purchaser bona fide, shall be void as vs such bona fide purchaser. with a similar proviso - Bac Ab. Fraud C. Roberts 7.8-note

We have no such St as y^e 27 of Eliz, and don't need it -

The constructions given to these Sts are in general y^e same -

These Sts are both in affirmance of y^e C Law. and y^e C Law I wd be y^e same with y^em - Cow. 434 - 3. T. 546 -

Roberts 2, 9-

Roberts says, to make such a conveyance void at C Law - fraud must be positively proved. Sed Quere - Rob. 80-116. 526. 28. 73

3 Co 83-

It was formerly held by the Court that a conveyance of
 Real Estate made by a person who was in a state of
 Insolvency was void as to protect prior creditors & purchasers.

Cro Elvi 444-

18. It such conveyance is void at Common Law only for protection.

Co Litt 290-a

Rob. 17-18-20-
 2^d Bro Chy 90-

But the distinction has been long insisted. The Court said that
 if a Common Law had have afforded a remedy in both cases -

And it is now well settled, that a conveyance to defraud creditors,

is void as well as subsequent creditors or purchasers, as to

prior creditors, by Common Law.

Comyns Dig- Convey B. 2- Rob. 194-5-

1. Root 325-

1. Root

3-

3 P. Mon 222

Cro Jam. 276-

Rob. 641-57

But such conveyances are valid as between the parties themselves,
 they are so valid by the words of the Statute - for the words are,
 that they are void only as to creditors - now if a fraudulent
 grantee give his obligation for the consideration of the conveyance -
 can it be enforced? Cro Elvi 445. 6. Co 72-

Page 20. 21-40. 41. 59-55-

The principle of Common Law must be the same - Such conveyances
 must be the same as between the parties -

5 Co 60-

Cock 711-12-

2^d Bro Chy 148-9th East 59-

Rob. 16-17-39-

And a fraudulent conveyance within the Statute, is void
 as to a subsequent purchaser, even though he knew of the prior conveyance
 at the time of effecting the conveyance, or purchase - Now where
 actual fraud is intended, by the prior conveyance, the rule is
 proper, but where the only objection is, that the prior conveyance
 is voluntary - the rule is harsh but well established -

I G. contra - to the rule -

1. Pontblum 271- 1. N B. 335. 2. Bro Chy 148- 9 East 74- 4. Cruise 375-

Same Rule in Equity, where a subsequent conveyance (for value)
 is executed, 18. when it is of a legal Estate - The rule is very
 harsh in some cases -

But the propriety of the rule has been doubted -

There is no danger of defrauding and no tendency to defraud those who have notice. These persons are not deceived, they are volunteers with yr eyes open.

And a subsequent purchaser for value under an Entry agreement, with notice, can't in Equity set aside such settlement, for 507 n. he has not y legal title and he has no equity. Rob. 234.

The rule in Equity, is contrary ergo to yt at Law - And if 1. Chy C. 287. such purchaser had y legal title, Equity wd not take it from him - As A makes a gift of Land, and post he agrees with B to convey to him for valuable consideration, but don't do it, Equity will not enforce it - 2 Br Chy 148.9 - Rob. 233 - 28.

And a conveyance upon valuable and adequate consideration, 3. if made with intent to defraud creditors, will as to ym be fraudulent and void - 2. Ves. 10. 2 atks 520 - Rob. 23. 25. 494 - 547-8-27.

3 C. 81. B. 2 atks 481 - So of a Judgment suffered for yt purpose - But fraudulent conveyances are usually voluntary - Rob. 490 -

In some cases arising under y St, of fraud is actual wh is imputed to y conveyance In others only constructive, or legal - 1 Rob. 35 -

First y Parties combine -

Second - No fraud is intended

Thus a voluntary conveyance, tho no fraud is intended, is constructively fraudulent -

But where y fraud is actual, it is not necessary, yt y party contracting shd have been deceived. It is y intent to defraud, in such cases, wh vitiates y instrument. Rob 35 -

This intent may be inferred from various circumstances, where it can't be directly proved. The most common circumstance in such cases, is gift & conveyance is merely voluntary. By fact of first conveyance has n't value, and there was a second conveyance ^{for value} is latis Eri ^{officiis} for first conveyance was fraudulent, so far as regards second.
Coup 280- 2 Br Chy 148-

4. Cruise 374-
 Rol 33 to 35
 5 Co 60. a.
 1. Eqty Co 334.
 Amb. 288-

It was olim supposed, yt if a conveyance was made for y^e purpose of defrauding a particular person, or creditor, yt no other creditors cd take advantage of it, But y^e Rule has been long exploded, and it is now held, yt such conveyance is void not only as vs y^e partie: cred^{rs}, but all y^e others - y^e tendency is to defeat all.

1. Co - 93 - B -
10. Co 56 -
4 - Lyr 192. ^h/₆
Roberts. 467-66 -

Palm 415 -
2 Rac 605
Rob. 53-58-60 -
2. Rac Towns

Such a construction as y former having been given to their
 its in suppression of fraud -

The Grantor's being indebted at y time of y conveyance, is a badge
of fraud under y 13th of Eliz - but so under 27. of Eliz -
For creditors ant contemplated by yd last Str

By "indebted" in yb and other rules, is here meant, embarrassed with debt.

25.

1. Lev. 150.93-
237-
2. 20 165)
1. m. 2. 119-

According to many weighty opinions, a want of valuable consideration, is only presumptive Evi of fraud under s. 13, and 27 of Eliz - I not per se fraud. sent - (395 66- 18. 61- 1. R. B. 486- 1. Pont. 268. 89 - 2 Bern. 44- Cor. 434. 705- R. B. 13. 15-

But it has lately been decided, yt a voluntary conveyance
is as such, is fraudulent within 9 St. 27. of Eli, any
conveyance not founded on valuable consideration is
a fraudulent and void in law - as vs subseqt purchaser of
same land subject 9. East 59-65- Pre. Chy 13. 2 Bes. 10-
526-628.

- 2
2. Ver. 261-
2.2. 1019-
Cro. 150-a-
1. E. 334-
Rob. 194-
204-626

In y^e case, tis for y^e Ct and not y^e Jury to decide y^e fraudulent -

Quere an y^e last Rule holds under y^e 13th of Eliz as to conveyances -

It seems, yt it ma not, where y^e Grantee was not indebted at y^e time of conveying - The last class of cases is there confined to y^e 27th of Eliz - The mere want of a consideration dont as I conceive render a conveyance absolutely void - under 13th of Eliz -

391-
11. Mass. Re 391-

Bull. 257 + Cruise 393. 98. 1. atts 94. 8. 2. 529-

1. Conn Re. 525. 9. Mass. Re. 390- Rob. 395. 6- 448. 52. 514- Talbot 65. 5-

For it has been settled, yt reasonable family settlements and advancements to children are good as vs creditors, where y^e Grantor was not indebted at y^e time and they are no badge of fraud -

Suppose A makes a reasonable settlement on his son (voluntary) when he is not embarrassed, But post becomes, (i.e. A does,) in debt, and y^e Creditor claims y^e property he has given to his son -

And y^e rule has not been judicially decided, ni in Johns e.g. John Equity Re. to be void, yt if A make a reasonable settlement and post become embarrassed, his creditors can take y^e property from his son. A was indebted to a small amt I held to be indebted within y^e St - P G Contra to y^e rule -

6

It. Hunt in favour of it -

What is meant by y^e grantor's being in debt? Dont it mean embarrassed wth debt i.e. involved -

See 3 Johns Equity Re. yt it is immaterial how small y^e amt of debt -

But ant y^e case of a family settlement y^e only one in which a voluntary conveyance is not per se fraudulent - Rob. 451. 395. 437- as vs creditors as well subsequent as prior? Tembe it is. i. atts 152 -

437-
Rob. 451. 395. 437-

2. vern 481- 1. Br Chy 24 - amb. 387. 95-

3/4567

4 Cruise

393. 24 -

Rob 103-5-

200-503-

Marriage is in law a valuable consideration

4 Cruise 388- (Deed 19-) Sugd. 434 2 B.C. 297-

To yt if a man makes a settlement upon his future wife and children and best married, it is valid - as for money &c

1. Comt B. 525- 2. Mass R. 390 - 1/2 do 421-

Powers of Chy 9- 10-

4

4 Cruise 388. 393-

Sugd. 434

Robts 105-

Hence a conveyance in consideration of marriage is good as vs subsequent bona fide purchasers - under y St 27 of Eliz -

4

4 Cruise 388-

De Ch 377- 285-

1. Selwyn 133-

And such a conveyance is also entitled to y benefit of yt

It as vs prior fraudulent conveyances -

Rob. 105- 23- 367- 502. 503-

But there is a difference to be observed, in one respect, between marriage and other valuable considerations

If a conveyance is made to A. B. and C. for a pecuniary consideration to A. only - all y Grantees are protected by y valuable consideration -

Rob.

Rob. 123- 4. 53- 2

664- 109- 10-

129

1. Robt 784-

7. Co 39. B-

0. Moa 132-

10. Do- 534-

But if in consideration of marriage a conveyance is made

to A. a party to y marriage and his issue & to y collateral relatives, it is void, as a valuable consideration will protect

those only who are within y object of y Settlement, i.e.

y original or original parties & y issue, & not called collaterals -

original

(Deed 21-) D.C. says y is correct -

Contra Coups 711-

Hard. 395. 98-

2. P 175-

It is said yt y limitation to y collateral relations in y last case are good as vs Creditors

Coups 711-

4 Cruise 319- 2. Lev. 105. 2 P 175-

Quere an they are good as vs purchasers under y St 27 of Eliz - Semble not.

Those latter limitations are good as without doubt as between y parties by y express words of y St

When executory they may be decreed in Chy -

Settlement after Marriage -

But a settlement made post marriage, if not in pursuance of an agreement made before marriage & not upon a new and valuable consideration, is considered voluntary - or fraudulent as bona fide purchasers. 3 Ves In 617. 1. Atk 624 - 1. Vern 294. Cow 287. 2. B Chy 148 - Roberts 187. 91. 213. 17. 191. 2. Vern 326 - 9 East 69.

Yet such settlements, if settler not being embarrassed at y time, have been usually supported as creditors. 2. Ves. 10 - 2. Atk 520.

Rob. 18 - 24 - 187. 191 - 228.

If he was involved in debt at y time ~~of~~ conveyance wd be void as to Prior and subsequent creditors, say Gould.

But such settlements are fraudulent as to subsequent bona fide purchasers. Roberts 16. 17. 187. 94 - 2. Vern. 327.

For they advance yr money for y property itself not on y personal credit of y Grantor or owner, as creditors do - do 13w. on Morg - M^{re} is preferred to General Creditors - or one such creditor - 234. 2. Vern 564 - Park 449. 8 - 1. 2. mms 191 -

The former case is like a special lien; y latter like a general one.

How a voluntary fine or recovery is affected by y Stat of Eliz -

But a settlement made post marriage in pursuance of an agreement or contract made before marriage, is not regarded as voluntary - & is ergo supported as creditors and purchasers. Rob. 218. 43 - Sir 237. 9. 1. Ely 354 - 3. Kel 6 - 2. So 700 - 1. vents. 193 -

Secus if y settlement varies substantially from y Prior agreement - emb 228. 2. Lev 146 - Rob. 245 - 228 -

1. Ver. 285-
Rob. 247.

But a ^{settlement} ~~agreement~~ may be good so far as it conforms to y original agreement. & fraudulent as to y residue.

For in such cases y original agreement is in consideration of marriage which is a valuable consideration and y settlement being in execution of y agreement, is supported by y same consideration. So y case stands, as if y article had been executed before marriage and Equity considers as done what ought to be done - or what is lawfully and fairly agreed to be done -

When agreement by Parol.

2 Lev. 248-
Cro. 2 454-

The rule is y same, even if y agreement before marriage made by Parol -

2. Ves 304. 1. Ves Sm 196- Sta 236-738- Roberts 226. 28-481-1. 83-

For y Ct of Trade has no manner of concern with y question between y settlers, creditors, and purchasers under y agreement.

1. P. M. 622.
2 Ves - 304. 09-
1. 42
Roberts 221.
241. 42-

(But if y settlement is not executed after marriage, but ^{rests} in articles only, and recourse is had to a Ct of Equity to compel a specific performance, y Ct will enforce it only as vs volunteers and creditors, not as vs purchasers - and needs ^{no} notice -
needs

For y interposition of y Ct being discretionary and y Equity being equal (for both parties are bona fide purchasers) y Ct will not deprive purchasers and needs ^{no} notice of y legal title -

They have y legal estate, quia at Law, such a settlement is deemed voluntary, as y executory agreement don't bind y property - at C. Law.

317

Settlement after marriage with any former agreement

But a settlement after marriage with any agreement before marriage, and with any other consideration yⁿ y^t of providing for children, is supported both in Law and Equity - is subsequent creditors - This Rule supposes y^t y^e settler was not indebted at y^e time of making y^e conveyance -

2. ves. 111-
2. atk. 520
Rob. 18-
24. 25. 24-25
191. 187. 19.
227. 227. n
396-

Proviso is reasonable and unaccompanied with any badges of fraud.

Purchasers with notice of Settlement -

But when application is made to a Ct of Equity to rectify settlements made post marriage (in pursuance of prior agreement) y^t Ct won't extend its relief so far, as defeat a purchaser for valuable consideration - even with notice -

Because Says Robert, he is supposed ignorant of y^e rules of Equity - Quere -

Secus where articles made post marriage in pursuance of an agreement require no execution - In such cases Equity will enforce articles vs a purchaser for value with notice - Here he has notice of y^e real Equity, not so in y^e last case -

Purchasers under articles -

On y^e other hand, if a purchaser under articles, tho' for valuable consideration, but with notice of a prior voluntary settlement, applies to Equity for a specific execution, his bill will be dismissed - for he has not y^e legal title and has no Equity -

Secus at Law. when he has a conveyance executed -

A recital in an agreement post marriage of its being in pursuance of one made before, is with any slight concomitant, facts satis, Eri, of y^e Prior agreement -

A Settlement made post marriage upon a new and valuable consideration, is not considered as voluntary vs creditors & purchasers. As in consideration of a wife's property.

So if made in consideration of a portion made by a friend of y wife.

Nor is it a ground of objection to y settlement in such a case, yt y stipulated portion has not been paid. The agreement itself to pay is a valuable consideration.

If a husband being obliged to apply to a Ct of Equity to obtain y wife's portion, is required by y Ct to make on her, y settlement ^{property} then made post y marriage is not considered as voluntary.

It is ergo good vs creditors and purchasers.

The settlement in such case, is y means by wh he is obliged to purchase y enjoyment of y wife's property. Ergo not voluntary, this post marriage. It is done under direction of a Ct of Justice.

And if y Trustee of y wife's ^{property} portion requires a reasonable settlement on her, as y condition of giving it up to y husband. y Rule is y same, tho there is no decree in Chy for yt purchase. For Equity wd have prescribed y same condition.

But if y Trustees voluntarily and without condition, resign y wife's property to y husband, and y latter in consideration of it, make a settlement on y wife during coverture, it is voluntary and will not stand as vs bona fide purchasers under y St 27. of Eliz. In y case, Equity wd have no chance.

2 Atk 420-
1. P. H. M. 388-
1. Do 305-
Rob. 278.9

Pre Chy 22-
Ambl. 121. 1. Atk
Rob. 288-85- 190-
Rob

Pre Chy 414
4. Ves. Sm. 18-
2. P. H. M. 639-
3. Do. 11-
1. Ves. 539-
2. Atk 67- 420-

to prescribe y condition ante mentioned -

313-

The above settlment wd be good as to creditors of y settler were he not in debt at y time.

14

In such cases y settlment is void as to purchasers for value, Quere ant it so as to creditors? Ni y husband were involved, ut Supra. It seems not - Ni

But if y settlment required by y ^{of y wife,} Trustees greatly exceeded what a Ct of Equity wd deem reasonable, it seems yt as to y excess it wd be void, even as to creditors -

2 Ves 18-
Rob 285. note
1. P. Mms 549. n-
3 Ves Sn. 506-

What is and ant reasonable, is to be settled by y Chancellor.

Void even as to subsgnt creditors - Semble -

These Rules apply to y wife's father or executor as such - He is a Trustee for her - But if there is an executor in whose hands there is a legacy belonging to y wife, requires a reasonable settlment on her, as a condition of paying it to y husband; y Settler ant voluntary -

-15-
A leg-
cant be obtained
in a Ct of Law
C 11

Str 239- 2 Ves. 18-
2 Atk 420-

Why wd have done y same -

Pre Chy 548-

3 P Mms 11-

Rob 285. 88-

If a wife has an equitable title to a chattel real, y husband may dispose of it free from any claim in law or Equity, for a provisionat or settlment on her -

7.18.
1. Bern. 7-18
2. Bern. 270-

Rob 299-662-3-270

Why I cant tell. See 4 P Mms 354

3 P. Mms 222-

Hence if a chattel Real is in y hands of a Trustee, as a base for yms and y Trustee insists on y husband's making a settlment on y wife as a condition, it will be voluntary and not good - Here Equity strictly follows y law - It wd seem then yt

This is unaccountably - settlement on y wife during coverture in consideration of such chattel interest, wd be voluntary, as well in Equity as at Law.

Disposition of Property by Women.

2. 2. Nov 357.
Rob. 348. 358.

In some cases, a disposition of property by a woman to a 3^d person ~~or~~ to her own use on y eve of marriage is in Equity fraudulent and void vs y subsequent husband.

Not so at Law - For under such circumstances y claim of y husband to set aside y conveyance, is not such as y law can recognize - He is neither purchaser nor creditor within y meaning of y Gro 13. 27. Eliz - nor within y Rules of y Law.

Distinctions -

2.
1. Br Chy 345.
1. Ves Jr. 22.
2. Do 194.
2. Br Chy 350
Rob. 350 4.
C11

First, if a woman before any treaty of marriage reserves an exclusive dominion over her property, with a general view to future possible coverture, y husband having made no settlement upon her, can't set it aside even in Equity.

This he has no notice of it at y time of marriage -

There must be fraud.

Not disinherited -

This belongs
to Devises

within

Practically.

Secus if one is dead. D.C. concludes -

And y rule is y same in Engld, tho one of y witnesses be beyond sea - His handwriting can't in y case be proved - For it is not presumed to be out of y power of y party claiming to obtain his Ev. -

Secus it seems if done pending a treaty of marriage or in contemplation of a particular marriage post had - or took place. 345 2 B. Chy 345

In such cases it wd be fraudulent vs her husband, having no notice, tho he had made no settlement. These cases are all modern. 2 Bern 17- 1. Pont 259- 2 Bac. 292-

Second. But if he has made a proper settlement upon her. of wh a Ct of Equity is y Judge, he may in y first case supposed, be relieved vs y reservation on y ground of fraud inferable from his want of notice. 2 P. Wms 333. Rot 239-357

Secus if he had notice -

If he has made a settlement, he is supposed to do it with reference to her property and ought to have notice, Hence y fraud.

Third If a woman in contemplation and pending a marriage treaty, make a settlement for y support of her children by a prior marriage, y settlement will be valid vs y husband - tho he has no notice. Such settlement has been holden valid vs creditors & subsequent purchasers. 1. Pont 259- 2. P. Wms 357 1. Bern. 408- 1. Atk 265- Cowb 705-745- Roberts 359-

This is an act of justice. There can be no fraud.

Quere as to purchasers?

So tho he has made a settlement on y wife. Rot. 358.59. 2 Chy C 42-

Fourth But if y hus. has made a settlement, wh was induced by an intended concealment of y provision for y wife's children, and by false appearances studiously holden^{at} by y wife, y settlement for y children may be set aside in Equity, as fraudulent upon y husband - In these cases, there is actual fraud. 18 533. 2. P. Wms 533. 2. Chy C 42- Roberts 358. 57- 35/

On all these and similar cases, actual fraud seems necessary to entitle y husband to relief.

J G thinks y settlement ought to be set aside, instead of y conveyance to y children, tho' no such thing has been done.

Sifth. If a woman on y eve of marriage makes a voluntary conveyance of her property to a stranger without y husband's notice, it is void in Equity as vs y husband -
 Fraud is implied, he has no equity.
 The hus. is deceived, an fraud was intended or not.

3
 3 P. 111-65-
 1. Burr 174-
 136- (note 1-
 131-
 Roberts 350. m,

So a wife has in some cases been relieved vs clandestine agreements (in Equity) of her intended husband with third persons prior to y marriage in fraud of her expectations.
 - prior - see Powers of Chy -

Who can take advantage of y St of Eliz?

19. Cro Eliz 445-
 Roberts 369-
 372-
 382-
 388-
 425-6-
 641-2-
 658

no other y n a purchaser bona fide and for valuable consideration can avoid a prior voluntary conveyance made under y St of Eliz - 3 Co 81- 1. Burr 396. 1. Nils 356-
 vide Ps. 21. 26. 40-

But marriage is a valuable consideration within y Rule.

Can a Trustee to whom a bona fide conveyance is made for payment of Grantor's debts, take advantage of y St? Said to be no such case.

There seems to be at least an artificial objection in y way, for at Law, And he has y nominal Title, - He seems to be strictly not y party intended to be defrauded, and in Equity there is y additional objection, y he has no interest -

If these objections are valid, y remedy must be sought by
y creditors themselves in Equity - *See Quere* -

a Purchaser, under a duly settled made in consideration 20-
a natural objection can't set aside a prior voluntary conveyance -
tho' made to a mere stranger! 3 Co 83. b. Cro Elr 445.

Roberts 390. 71-

Same Rule as to a woman claiming a jointure made Cro Elr ⁴⁴⁵ 445
after y marriage - She can't take advantage of y St. and Rob. 371-
set aside a voluntary conveyance the jointure being itself voluntary - & being not y cause
of y marriage and ergo no valuable consideration.

But if one purchases for valuable consideration, mere
inadequacy of price, is no objection to his taking advantage
of y Statute

That is, he may set aside a mere a prior voluntary conveyance
tho' he gave only half price - But inadequacy of price Cow 705. 13.
attended with circumstances indicating collusion - between 1 Eq 5 Co 168-
y parties for y purpose of overturning a prior voluntary Roberts 371-
conveyance, may be a satis objection - to avail himself of it. 648-
of y St. see Ro 19. 59.

Secus a purchaser *malu fide* might take advantage
of y St and y binding force of y prior voluntary
conveyance be defeated -

But a gross inadequacy of price amting only to a 2. P. 11^m 618-
colourable consideration, is itself a satis objection - for Cro 713-14-
y reasons Roberts 573- Rob. 373-14-

So if a subsequent purchaser for valuable consideration 3. Co 83. B-
but inadequate, appears to have ~~been~~ overreached or defrauded
his Grantor, he can't avoid a prior voluntary conveyance

Rob 372.

Co Ebi 445

22. 22

a free ant gen A free purchaser within y to and may ergo take advantage deemed a purchaser of it if y mortgage is bona fide and for valuable consideration.

2. Bern. 272. Holt 477. Cowp 713- P Rob 373. amb. 289-

Rob

Rob 392. 462.

to y cognize of a staple or recognizance

1. Chy C 59-219.

Robert 373-
657-

But a free being in Equity a purchaser only for y purpose of security, and to y extent of his debt, y voluntary conveyance an prior or subsequent, is void as to y free only "are void" and ergo y solitary purchasers will hold y Equity of Redemption, and of course have a right to redeem y mortgage, and upon redeeming y land out of his hands, he may hold it.

This don't interfere with y Mortgagee's claim-

P. 60. Title M's 12-

23-

It seems however Equity will never open a foreclosure in favour of a subsequent - voluntary purchaser, he being entitled to no favour-

2 Lev 70-

5 Co 24-

Hutton 84-

Rob. 374. 455-6-

2 Rob 400-

The opinions are not agreed on a mere surety to whom a lease is made, for his indemnification is a purchaser within y of it. The weight of authority appears to be however in his favour- Contra Dyor 205. a. 2 Roll 783 - Rob 374-

But y lease is said to be questionable.

24
24-

If it is an absolute lease it seems to be void on principle, as to third persons, qua to an absolute transfer of property, where y payment of any consideration for it is altogether contingent. I would tie a plain secret Trust between y parties - on which ground our Sup Ct and Ct of errors have adjudged y conveyance fraudulent as to creditors-

To constitute a purchase within y St of Eliz 27, a purchase must be of y identical thing or subject of y fraudulent conveyance, Secus he can't take advantage of y St.

Thus when A had a lease for 60 yrs on condition forged an absolute lease of y same land for 90 yrs and for value sold y forged lease (rectifying it) and all his interest in y land to B, it was resolved, it was not a purchase within y St. For he didn't contract for y true interest of A - and y interest passed, as between y parties by y General words - Yet y valuable consideration didn't extend to it -

But if y valuable consideration is paid, it is immaterial, it seems, what species of interest or right is purchased, whether y subject purchased is an actual positive interest, or y mere extinguishment of an interest - A Lessee for yrs makes Rob. 376. a fraudulent sale of his lease and then for value surrenders to y reversioner, y latter may avoid y sale -

A Lessee for yrs for valuable consideration, is a purchaser 25= within y St, and y reservation of rent is a satis valuable ^{2. Ver. 327-} ^{2 AC. R. 1019} consideration - he may set aside a prior voluntary conveyance - 1019. Cro L 181- Rob. 376.7c

It is said y't to render a conveyance fraudulent within y 27. of Eliz, he who makes it, must be y same person who post sells to y bona fide purchaser - and y't if it is secus, y latter can't take advantage of y St. This seems to be true in those cases only in wh y person making y latter conveyance, has not y estate in himself at y time. Or rather where he is a stranger to y Estate at y time -

So Grandfather, Father and son -
 Grandfather made a voluntary conveyance to his Grandson,
 & died. The father ^{conveyed} y^e land for a valuable consideration.
 Ruled y^t y^e purchaser ^{did} not set aside y^e voluntary conveyance,
 And it wd have been seen, if y^e Grandfather had made
 y^e last convey^{ance}. For y^e father was a stranger to y^e estate at y^e time,
 it having passed to y^e Grandson -

But if y^e person making y^e subsequent conveyance, And not y^e
 same y^t made y^e prior voluntary conveyance, has y^e estate in him,
 at y^e time, y^e subsequent purchaser may take advantage of y^e st,
 as Father made fraudulent conveyance to father post- Grandfather's
 death, Father assigned by fraud to his son - Hold y^t both
 lease and assignment were both void, as is y^e purchase -
 For y^e father had y^e fee simple by descent, not a stranger -

Rob.
 46. 488-9-
 658-
 2. Vern. 473.
 Rob. 384-
 28-

But if it makes a fraudulent conveyance to B and then
 makes a voluntary conveyance to C. and C sells to D
 for valuable consideration, I can't avoid y^e first fraudulent conveyance.
 For C took no estate even as between A and himself.
 Hence his sale to D was y^e act of a stranger to y^e estate.
 And in such a case, it is immaterial, on the point, knew
 of a fraudulent lease or not -

3 V. 222-
 Rob. 389-

A Trustee under a voluntary settlement can't become a
 bona fide purchaser within y^e st, so as to defeat y^e settlement
 in Equity - For he can't acquire a right in Equity,
 by a breach of Trust. He don't act bona fide -

And if a Trustee by direction of his "Cestui Que Trust,"

32 1/2

makes a voluntary conveyance, he can't witht y direction of his Cestui Que Trust defeat it in Equity by a subsequent sale to a purchaser, even with notice. Moore 787- Finch's Re. 489-
quest. in debet esse "without"

For y conveyance is in Equity, a conveyance by y "Cestui Que Trust" & y latter being a breach of trust is disconnected with it, & thus as regarded in Equity, made by a stranger to y Estate.

But a person who makes a purchase in his own name, and with y money & for y use of another is a purchaser within y St, for he acts in pursuance of y trust & takes advantage of y St for y benefit of y "Cestui Que Trust,"

Roy 105-
Rob. 391-

a purchaser purchasing any rent or profit out of land, may be a purchaser within y St, as purchasers of trees growing -

D. his. Prin 22-
Rob. 393-

Same rule in favour of all incumbrancers.

When there is a voluntary gift of money due or other personal chattels, if it is consumed or has passed away by fraud - if done ante y Creditors can take it in execution, or is not to be found - his remedy as to y property is gone in England. for y only way in general in wch he can set aside y gift, is by securing y property on his execution.

29-
Lay 258-
Rob. 223-24-
-24-
at C. L.

And it seems. Equity in such a case can't supply a remedy - for Creditors can secure a lien upon it by an attachment on mesne process. But if is consumed or gone before attachment y remedy here also is gone, for no action for damages will lie or be done.

A fraudulent
Conveyance
is here and
Eng. incurs
an penalty.

Both here and in Eng y creditors may prosecute for y penalty
of y St And there is a similar penalty provided for
purchases by St 27 of Eliz.

Rob. 3. m. 424.

Little Fraud Convey. 511.

And it seems by some opinions yt a voluntary gift of money
is not within y St 13 of Eliz -

Song 219-230-

2 How. 166-

Toller. 238-

Office of Ex. 89-

1. Eqty Co 149-

2. Vern 490-

2

It appears to be intimated, yt it must be ^{taken} on execution,
where if y specific money can be found in y hands of y donee,
what is y objection to its being taken on execution -

Exec. 2. 8- Exec. and Adms 78-

Rob. 424-

Rule in Crouch 116. 34- yt money of y execution debtor,
if in his possession may be taken on execution. Aliter if
it is only in y hands of y Sheriff who has collected it
for him, but has not paid it over. It has not then
become y debtors property -

Money may be taken in Execution - at C. L. & C.

2 Wils 339-

3 P. 17m

332. 39.

Talbot 153-

in y case of induction, if y inducer by way of reparation, gives
a bond it is void in Equity as to obligor's ~~and~~ creditors, tho'
good between parties - 1. Eqty Co 87 Rob. 428-437-

Is matter of Equity - Contracts 48- P. 39. of ys title In law - bonds are

The obligee can't hold as a creditor of good consideration - more positive too.

And hence it wd. seem yt a conveyance upon such condition

Rob. 428-

condition wd be void at Law under 13. et 27. of Eliz as to
creditors and bona fide purchasers - for value -

32-

1. Leon 194-

2. Vern. 510-

Rob. 429-

437-

3 Co 26. 7-

2. Leon 233-

1 Gr 165. 4 Bay 146. 395.

2. Root 26- 2. Comnt Re

633-

A Conveyance to Trustees for payment of debt (no creditor
being a party to it) is said to be void as to dissenting
creditors and bona fide purchasers - "Quere" Post



It is deemed voluntary, *Fleming*, Rob 429. quia y trustee is a stranger to y valuable consideration, there are not y creditors presumed to assent, till y contrary appears, 4 *Gay*. 146. 395. 2 *Root*. 26. 2 *Count Rep*. 633. 3 *Co*. 26. 7. 2 *Leon*. 233. 1 *Str*. 165.

But if a creditor is a party to such a conveyance to Trustees, it is supported by valuable consideration - 3 *Co*. 81. 5 *J.R.* 420. 8 *Do*. 521. 5 *Do*. 235. 4 *Do*. 167. *Doug*. 671. n. 1 *Cam*. 148. 2 *Map*. 42. 5 *J.R.* 420. 6. 5 *30*. (Contra) 4 *Gay*. 146. 3 *Gay*. 340. And is good as to a creditor not included in y Trust. 5 *Johnst*. 413. 2 *Do*. 226. 1 *Do*. 156. 4 *East*. 1.

Now is y conveyance good as to y creditor who is a party to it, if y former rule is correct.

A Conveyance or assignment to Trustees for y payment of debts, made in a neighbouring State by y laws of wh it is good, as dissenting creditors, will be so in y State - The *lex loci* governs - 3 *Bell*. 370. 2 *Map*. 89. 1 *Bos*. Pull. 138. 1 *H*. Bl. 665. 4 *J.R.* 182. 2 *Burr*. 958. 1 *Johnst*. 402. 3 *Cranch*. 73. 5 *East*. 124.

But suppose y effects and creditors are in y State, and y conveyance is by y positive St of y State declared void, y rule then, says *JG*, wd be seen, There is a case of y kind now pending in Georgia -

And such a conveyance for y payment of debts as is valid according to y foregoing rules - is valid as it seems, tho' y debts, (for y payment of wh y conveyance was made) are barred by y St of Limitations -

By our St it is valid, and there be no creditor joined in y assignment - for property is not to be made

Invalid by the Statute, if the debt be due before the Statute made.

33-

33d

Rev. 432.3-

5. 8. 263d-

to 543-

Id by 389

1701

For y remedy may be taken away by y St-

The debt remains & simple y conveyance ipso facto revives y remedy - I.E. removed y St bar - Doug 629. 2 Sum 1099-

Ep 152, 3 & 434. 2 B6 H. 340

And if post y conveyance to a Trustee with y proviso
of any creditor, y creditors included in y Trust bring a bill
in Equity vs Trustee for y performance of y Trust (wh^{ch} in
general will be granted of course) y decree validates
y conveyance 'ab initio'

Rev. 434

by 33-

This is still y Eng Rule -

35-

For a conveyance thus rec^{ev}ed y sanction of a Ct of
competent jurisdiction, and to set aside y conveyance
w^o be to impugn y decree -

1. 3. 421-
675

Donations to charitable uses, are void as to creditors,
if y donor was indebted at y time -

1. 6em 230. Rev. 438-

Where are they void, if y donor was not indebted at y time?
Simple not.

Rev. 438-

The rule is founded on y principle, y^t a man must be just,
be fore he is liberal, and a purchaser for valuable consideration
with notice can't set ym aside, as he may common
voluntary conveyances -

36-

Depos on
2. Legacies

1. 2. 406-

A 'donatio causa mortis' must on principle be void
as to donor's creditors, it being Testamentary - Here we
have no St. and kata principle before laid down, y
voluntary conveyance, even tho' y deviser was not indebted
at y time of y donation, w^o be void as even to
subseqnt Creditors - y^{et} sh^d it not be purchaser!

Rev 442.4
2. 6.

St 777- 77 47. 12 Rev 442.4

It has been determined in ^{Equity} Eng. yt a conveyance to Trustees for y^e paymt of debts, was not void as vs a Pltff in an action arising "ex delicto". This made pending y^e suit, and with y^e professed object of defeating Pltff of his charges

For there is no debt nor ascertained duty existing at y^e time in y^e Pltff's favour, as in y^e case of slander, trespass. he is neither purchaser, nor creditor - at y^e time of conveyance -

Deed is made between judgment and execution at holden even as at Calo. He is from y^e moment a creditor - and
 1. Leon 47 - Ps 32 - 51 -

It seems however yt a conveyance for any other purpose than a valuable one, and not in such a case be good as a Pltff -

But it seems yt a conveyance for any other purpose than a valuable one, and not in such a case be good as a Pltff -
 and y^e great ^{personal} contract, giving a right to damages, is not void as to the covenant, it is actual law of property -

So there is no personal debt or duty. With much doubt if y^e covenant were for y^e payment of a sum certain. The claim wd then be a debt, and y^e settlement wd be void. The Covenant in such a case creates a debt in present.

If one so procures an estate to be conveyed to another, originally (or to a son) instead of to himself - it is not void as vs his creditors, or purchasers under him, in y^e conveyance appears to have been in trust for him - For here there is no conveyance of his own property by the Person procuring y^e purchase -

1. atks 34. Roberts 454 - 2. 2. 4, 5. 1 P 17^{ms} 111. 608. R. 6 408. note -

one under a car. trap saw the witness can take it and and had it.

38-

re. holder, &c. not to be fraudulent, and the father held possession and took it under a son's minority. For he was considered as acting in a character of Guardian -

Issue in England, if a father continues to enjoy post mortem becomes full age -

It is good to show a trust for a father -

Pro Elve 291-
Rob. 407-8-

In general if one person has a mere power over property, in another right, a conveyance of it by a power, can't in any case be fraudulent as to his creditors - Husband in right of his wife as executor - In such case his conveyance of any chattel interest, which was assets in her hands, is not fraudulent as regards his creditors - Quere as to Bona fide purchasers &c

2 Bern. 287-
1 J. ves Sn.
196-

Jugd. 437-
7. 6. 470-71-

But if one having a power over another's property, conveys it in trust for himself, or conveys it to another in trust for such persons as he shall appoint, his creditors then, it seems, may set aside a conveyance, for by this conveyance to himself or in trust to himself, he has a complete control over a beneficial interest, and any subsequent voluntary settlement is fraudulent as to creditors -

39-

2 ves 10. P. 17^{ms}
2 52. 232.

of appointment
And whenever one having a general power over property, makes a voluntary appointment, it is void in Equity as to his creditors - As a devise of A shall have a power

333
465-
2 vern 219. 46
1. atts 465-
3. do 656-
439-
Tugden 437-

of appointment, & B and B's Appointee becomes virtually devisee, And y gives A a power of appointing himself, so yt if he makes a voluntary appointment, it will be void, as vs his creditors - I fear if y power is Special -

Voluntary Bonds

By y 13 of Eliz, not only all conveyances &c, but all voluntary bonds are void - Now y validity of voluntary conveyances is to be tried in a Ct of Law - But yt of a voluntary bond, is to be tried in a Ct of Equity - In Ct of Law every bond imports a sales considn -

Pre Chy 1/-
1. atts 223-
Barnadister
397- Rob
Rob. 478-

But in Equity bonds resting solely in contract may be disputed & postponed to debts on valuable ^{bona fide} ~~consider~~ ^{consideration} - But post y obligor's death, y question of validity of y bond may in many cases arise in Law - As By executor's pleading a bond outstanding vs Testator - As th y mode of y Executor's doing yd vide Rob 479- 70- 80-

Pre Chy
376
1. atts
223-
46-

But usually when claims rest merely in contract, y question is tried in Equity, being impeached on y matter of conscience & account -

A bond remaining in y possession of y obligor is a very strong badge of fraud -

Where a father executed a bond to his daughter and kept possession of it, till his death, y bond was set aside, ^{as with} even vs devisees - Such bonds are generally good as vs mere volunteers, as legatees or persons claiming under y St of distribution -

Rob. 450- 85- 1. P 11th 571- 1. atts 625- 2 8, y is 256- Pre Chy 571-
50
51
So where an action is brought on such bond vs executor, or y obligor, he can't contest on y ground of its being voluntary, & he can
1. atts 625- 2 vern 427- Rob. 455. 643- 61- 2 ver. 514- 3d 1111

could it not be proved, and showing of goods & value
are needed for payment of Bona Fide creditor -

Do. 19-20-54-5. 61-

Fre. Chy 17-
42-2 term
Rob. 489-30-
Holl 321-

Is a voluntary and a regularly void, and fraudulent
as vs bona fide creditor, So a judgment obtained
by confession is also void, if it be voluntary.

So also, if Judgment be obtained by due course of Law -
yet if it be upon a fraudulent bond, & it will be void

But as to y burden of proof y distinction prevails in y two
cases.

Rob. 489-30-
Holl 321-

If a judgment claimed to be fraudulent, was obtained by
confession, y Plt in y Judgment, takes y "onus probandi"
but where verdict has been obtained by trial and verdict
y "onus probandi" lies upon y party impeaching y Judgment -
quia y confession looks suspicious -

5th 235
+20-
3 Day 340-
4. Do 146-
2 John 226-

The more numerous the creditors to another, don't render a
conveyance void, for at law he has no right to
prefer one creditor to another -

Rob 436-430-91- 1. T. 90 690-1. sent 323-

This rule however has been restricted to a certain extent
by y sale of y Bankrupt Law -

420-

And when a voluntary bond has been delivered up to be cancelled,
a Ct of Equity has under special circumstances, decreed performance
of it as vs volunteers - As Voluntary bond post marriage
to settle a jointure, y jointure being settled, y bond was
given up, y jointure post failed -

So a rule in Equity if one assigns a bond for money he

and receiving, and fails to prove it consideration, he can't
have set it aside out as a voluntary bond in a mortgage
consideration—

A conveyance void in its creation may become good in favour
of a Bona Fide purchaser, by matter "in bona fide"

1. Pelton
133—
Rob. 435—

If A makes a fraudulent conveyance to B, A being privy
to fraud, A conveys property to B a bona fide purchaser,
not being privy to fraud, A also conveys same property
to C a bona fide purchaser. Now B will hold property
to the exclusion of C— Same under 13. and 17 of Elix—

1. Tiffin
133-477.
Holt 477.
1. Tr. 243
3 Lev. 387—

1. East 55— Holt 477— Sugd. 436— Bromber. 242-43— 1. New & 332— 332

If A is original Grantor & as between parties of conveyance
is binding, so if A under of it, comes in place and has
all rights of A— It follows if a conveyance by A to
a bona fide purchaser, would be valid, so of course such
conveyance of A will also be valid—

The rule is y same under 13 of Elix, If A is a fraudulent makes
a fraudulent conveyance to B, and A being privy to fraud, and
A makes a bona fide conveyance to C, who has no notice
of fraud, - B will have and hold y lands as creditors
of A, and for y same reasons. See Holt Sugd, what B,
doth, A's doth—

190
9. Ves In 13
Sugd 43—
R. v. 437—
6. Gran h 8—
34-5

3 Mass 541— 10. 20 125— 3 R. nney 54—
18. 50— 515— 13. 50 471— 1. Bonnt de 527 note

Same y's right of authority it was holden by a decided C
if it was fraudulent— 3. Fenton R—

under of 17 of Elix, a valuable consideration bona fide, wherever
it occurred, entirely obliterated y fraud, so if it never again can
affect y transaction— Thus a purchaser for value of y fraudulent
Grantor, will hold vs a subsequent bona fide purchaser,
from y original Grantor—

to make a voluntary grantee of a purchaser for value, and he may avoid a prior voluntary conveyance of original grantor - for he has the same right, which his grantor had -

in some cases & marriage settlements, a constructive consideration ex post facto, has been holden to support a conveyance originally voluntary as a bona fide purchaser for value. Thus where one having been long in possession under a voluntary conveyance entered into a treaty of marriage, & by other party to marriage trusting to his appearance of ownership, is induced to consent to the marriage, and acquires a settlement of property, the settlement has been adjudged good as to creditors and purchasers of the grantor. For an honest purchaser confiding in such complete title, & title, ought to be protected.

Profr. 455-
Shepherd 65.
2^d Bul 225-
Rob. 517. 1818
Rob.

46

A conveyance originally good, and not fraudulent, by matter ex post facto, as if mortgage remains in possession for a great length of time, still if a mortgage was valid at first, it will remain so -

I have always doubted the wording of the rule, yet a fraudulent conveyance may become good by matter ex post facto, The fact is, yet the conveyance is not made valid, but it is made a channel through which a good title may pass -

conveyance -

A fraudulent, can never become legitimate in favour of a fraudulent grantee, by any length of possession, & he remains in possession 15 yrs. by which possession a man wrong - does not obtain title, still a fraudulent grantee does not obtain title -
4 Day 484
1. Pont 322
Rob. 521
Tolles 84 -

1stly, don't y fraudulent grantee acquire title by y possession?
 1stly, y possession is fraudulent. — y continued possession
 is a continued fraud upon y Grantor's creditors —

Second. The possession must be adverse — But y creditor's
 of a y Grantor never had a right of entry, till y levy was
 made, and no one is barred, ni he had a right of possession
 during yt period.

The 1st 13. 2^d 3^d 4th 5th 6th 7th 8th 9th 10th 11th 12th 13th 14th 15th 16th 17th 18th 19th 20th 21st 22nd 23rd 24th 25th 26th 27th 28th 29th 30th 31st 32nd 33rd 34th 35th 36th 37th 38th 39th 40th 41st 42nd 43rd 44th 45th 46th 47th 48th 49th 50th 51st 52nd 53rd 54th 55th 56th 57th 58th 59th 60th 61st 62nd 63rd 64th 65th 66th 67th 68th 69th 70th 71st 72nd 73rd 74th 75th 76th 77th 78th 79th 80th 81st 82nd 83rd 84th 85th 86th 87th 88th 89th 90th 91st 92nd 93rd 94th 95th 96th 97th 98th 99th 100th

3 Co 82 -
 1. Do 131 -
 5. Do 77 - a

Rob 75. Plow. 59-78-

But so far as they inflict penalties upon y parties, they are 1. B. 6. 88-
 construed strictly like any other penal 5th, "Municipal" Law -
 19-22 of yt title -

In construction ergo, these 5th have been held to include
 transactions not are not within y letter -

Thus where a Tenant for life committed an act of forfeiture, 1. Bent 257-
 of his estate, in order yt y reversioner who was bound to y Roberts 589-9.
 design might enter for y forfeiture, so as to defeat y 590.
 creditors of y Tenant for life. This has been held,
 to be a fraudulent transaction as regards y creditors.

In y construction of these 5th there are several enumerated. 47-
 badges of fraud, Wh follow - 3 Co 81-

I The fact of y grant's being general i.e. including all y grantor's 3 Co 81-
 property in general terms. This isn't conclusive, but a strong More 638-
 badge of fraud - a Rob. 546-
 585-

II. The fact of y grantor's remaining in possession post y execution
 of y grant, is a strong badge of fraud. It is said to indicate a Trust in his favour

Rob 559-
Rob 578-

That the fact of a grant being made in secret is a badge of fraud, for such grants are usually made in secret.

Rob 578-

That it was made, pending a writ or action of debt vs Grantor.

5. The fact yt there is an apparent trust, and yo is by far y most ~~to~~ important of y mode.

6. That there are suspicious circumstances, as yt it is made in some tide and for good consideration.

7. a conveyance made in y absence of y grantor, is a badge of fraud.

8. The Grantor retaining y land on his own possession is a badge of fraud.

9. The grantor being involved in debt, yo is specially a badge of fraud under 13 of Eve.

10. a lease of reversion, is also a badge of fraud.

3 Co 81.

These are y most general badges of fraud. There may be many others, they may be infinitely various.

But best of all y badges are important, only as they conduce to prove y 5th an apparent trust between y parties.

But yo isn't universal, for yo isn't y case, where y conveyance tho' fraudulent, is for a valuable consideration, and intended as a real disposition between y Parties and not merely colourable.

Possession of y property after an absolute conveyance by y vendor, is a strong badge of fraud. But possession of Real property

by y^e Vendor, after an absolute sale is not so strong a
 a badge of fraud as in y^e case of Personal Property. For
 Title to y^e former, is to be sought in Title deed, to y^e latter
 in possession - Rob 197. to 200. 1. Wils 44. 7. Mod 37. Raym 252 -
 548. 555. 71- 3 JR. 620-
 Pre Chy 286
 1. Ves. 456-
 245

Where y^e Grantor or Vendor not only continues in possession -
 but accompanies y^e possession with acts of ownership,
 y^e fact renders y^e presumption still stronger.

Possession y^e deed of conveyance is itself a badge of fraud - Rob 549-
 and rendering the conveyance accompanied with possession - 550-51-4,
 of a property, which possession is almost un rebuttable Ev.
 of fraud - incontestable 48-

There could be y^e subject of y^e conveyance y^e continued possession
 of y^e Grantor is only presumptive Ev of fraud, and y^e presumption
 may be rebutted by other facts - as if one having conveyed to
 Trustees for y^e payment of debts, is left in possession as Bailiff -

But it has been held, y^e possession of goods by Vendor
 after an absolute sale, makes y^e sale fraudulent per se, and 2 JR 587. 25
 independent of any proof - So y^e any proof however strong, Pre Chy 286
 is not admissible to show y^e sale was bona fide - 2 Bull. 225
 Why shd y^e be fraudulent, per se, y^e consideration, Rob. 558-63
 Suppose, enters into y^e 563 64

But on y^e other hand, there are numerous authorities, y^e 3 Co 81. a
 y^e possession of goods by y^e Vendor post an absolute sale,
 is merely a badge of fraud, and may be rebutted by other
 circumstances - Bailmt 93- 1. John C 159. 2 Bat J. 59-82, 258-
 3 Es. Re. 38-8
 32. 52-

50.

1. atts 160- But however y time may be, it is near, y^t if immediate
 2 462 delivery of y goods to y vendee is impossible, y want of
 TR 485 possession of y vendee neither makes y sale fraudulent
 491-
 1. ves 354-61. 66- nor is it a badge of fraud - as Sale of a ship at
 TR 71- 1 Burr Sea - 1. Bos Chy 125- Selwini J.P. 197- 220-240-2.3-
 7 478-

I have always thought y^t possession of goods by y vendor,
 is only a badge of fraud, so y^t if y vendee can prove y^t y
 sale was "bona fide" y sale will not be void, and in
 ordinary cases, y^s last is y most rational rule by far -
 as y Case of a country Merchant buying goods in N.Y.
 and leaving ym in y hands of y vendor, a short time
 till he can send for ym -

4. TR. 71- Further where immediate manual delivery must be very
 1. atts 170- inconvenient, y want of delivery may be supplied by a
 TR 71- symbolical delivery - but y ^{term} "symbolical" is improperly
 1. Selw R 220- used, for it is in fact actual delivery - so where goods in
 Rob. 550- in warehouse are sold, y delivery of y key is satis -
 - 51-

2. Buls 225- Where y grantor's or vendor's possession is inconsistent with
 1. ves. 365-69 y deed of conveyance, or y terms of sale, such possession
 Pre Chy 287- is no badge of fraud - Thus if a man makes a deed of
 Rob. 197- conveyance to take effect on y performance of a condition
 Rob. 199- precedent, his retaining possession till y condition is
 548- performed, is no badge of fraud -
 556-
 561- 2 TR 594. note -

And y time is y same, if goods are sold on a condition
 precedent, so as w^{ch} regarding at 15 of Eut -

A mortgage remaining in possession of lands mortgaged is no badge of fraud - for the grantor is a purchaser of y lands but merely has a lien upon ym - by way of security -

Cro L 455

Phep. 68-69

Rob 197-99-

200-51/2

557-

But a mortgage of goods is void under y St 21. Lam. 1. as vs y Mor, if while in possession ^{he} becomes bankrupt - The provisions of y St are intended to remedy y evils of a false credit witht any reference to y fraud -

1. Ves. 244-

2. Do. 348-

1. Will 260-

1. attes 160-

Ex D. 556

1. Selw 226-

Rob 556. 7. 52-

If a person becoming insolvent is allowed to remain in possession and disposition of another's goods, y creditors of y bankrupt may take y goods as his, for it gives him a false credit -

If a creditor having seized goods on execution, suffers ym to remain long in y debtor's hands, they are liable to be taken on execution by other creditors - for it gives him a false credit and y other creditors are not presumed to know of his secret lien on y goods -

That y conveyance was made pending a suit for y recovery of a debt vs y Grantor, is also another badge of fraud, But as I conceive, y is a badge of fraud under y 13 of Eliz only - 18. in favour of creditors merely, and not as vs subsequent purchasers under 27. of Eliz - Same Rule if y suit is pending in Equity -

549.

1. Rolle 549.

1. Leon. 47-

Rob. 573-78

-78-

And a conveyance after judgment has been had, and before satisfaction, has always been regarded, as a badge of fraud - and y is somewhat stronger ym y former, for while y suit continues, it is uncertain (at least in contemplation

52-

Dug 88-

1. Vern

460

1. Rem 460- of Law, it is uncertain what may be a vent of a vent -
Not so in a present case -

The cases in which those badges of fraud operate to establish
a inference of fraud are chiefly those where a Grantor
has become insolvent, so that other property can't be
found to satisfy his debts.

But if one purchases for full price and bona fide,
tho' without notice, yet Grantor is indebted by bond,
or other contract, his title isn't affected by a notice
even in Equity, as property can't be made unavailable
quasi a Grantor is in debt -

1. Roll 34-
3 Co 82-
Skinner
357-
Rob 582-

Under a 13 of Evis if one conveys his land under an intent
to commit forfeiture by an act of felony and then commits
a felony, a conveyance will be void as to a Crown or State,
This tho' not within a terms of a St. is within a principle
of a General Law - and a it is in affirmance of a C Law

Rob 582-

and if one makes a conveyance of land and shortly afterwards
commits a felony, it will generally be presumed, if he made
a conveyance with intent to avoid a forfeiture -

Pro Evis
233-
Hobart 72-
5. Co 66-
3. Co 78-
Rob. 587-

Mode of taking advantage of these Sts -
The party taking advantage of these Sts. does it, by breaking
a conveyance with ill-faith -

It is a rule to allow a party to take advantage of these Sts.
in relation to a fraudulent grantor - then even if creditors
have acquired title, they may avoid it as if granted -

Sometimes recourse is had to try to set aside y fraudulent conveyance -

Where y question is raised by special pleading, y fraudulent conveyance is treated by y party wishing to set it aside as if it were no conveyance. If a debtor makes a fraudulent conveyance & dies, and his creditors bring an action vs y Cro Elvz heir, and he pleads no assets by descent, y creditor, # 810- may reply, yt he has assets by descent, viz y property Rob. 595. 92 fraudulently conveyed and prove y fraud - 92-

Rule y same, where y conveyance is of personal chattels -

The first and direct step then, is for y creditor to be taken by y creditor, and then y question an y conveyance was fraudulent or not, may arise.

If one having made a fraudulent conveyance is indebted, y case is y same as if he had died in possession without y conveyance. Rob. 592. 35- Cro Elvz 810- to his creditor, and y property is considered assets for y payment of his debts, and in Eng may be taken on execution upon judgment recovered vs him - 810-

The real property of a person deceased, is never in y Cro Elvz 810- manner taken possession of on execution in y State for his debts, but y property must be sold by ~~exec~~ y execution Rob. 592. 93-5- under an order of Sale - Here ergo y executor must pursue y remedy for y creditor - for if y rule were allowed one Ps. 40-56 creditor, by taking y property on execution, wd defeat our average law - Here ergo y Cred^{rs} may claim yt y conveyance

was fraudulent before, & probate it -

So if a donor having fraudulently conveyed a chattel, it can't be set aside in probate, unless it can be found -

In the case of one who after a fraudulent conveyance of his real property, his creditor's creditor can't take property in probate, because it is liable only to debt of a higher nature, i.e. specialties - 2 Bl C. 243. 3 Do 430
Rob. 592. Lovelace on Wills 93-

Under 13 of Eli of fraudulent purchases of goods, if he takes possession last & death of a Donor, or ^{Vendor} vendor, may in some cases be charged as Executor "De son Tort" by a Creditor. So yet in such cases, a creditor has 2 remedies, either as a donee, or he may bring his action as a rightful Executor and seize a property fraudulently conveyed - 2 TR. 589
2 Leon. 223- Cro Jam 271. Yobr. 197

Cro J. 271-
3^d Leon. 57-
Bull N.P.
258-
Esp Dig 542-
Rob. 593-94-

It is a rule, that if a purchaser obtains a goods by a permission of a rightful executor or administrator, he may be charged as "Executor De son Tort" in a case where a fraudulent purchaser has possession of a goods by a delivery or permission of a rightful executor. So yet he can't set it aside as fraudulent as bona fide creditor, therefore as he can't reclaim ym, a law allows a creditor -

2^d TR 587-

So yet if a fraudulent vendee takes possession of a goods after a vendor's death, but before probate of a will, or before administration granted, a creditor may treat him as Executor De son Tort. For yd is a wrongful intermeddling, and as a creditor are only persons injured, they may pursue a remedy -

sure can there be any executor de son Tort, in Court,
y while being insolvent. it is doubtful, as if there can
our average law not be departed -

But it is said, if y vendee takes y goods part y vendors Cro Elv
death, but with permission of y rightful executor, after probate 810-
or administration granted y vendors creditors cant treat Rob. 593-4
him as Est. de son Tort, quia he is then a trespasser 5 Co 33
to y Executor or administrator, and may be sued as such. 1. Lalk 313-

This last rule however is contradicted by ^{other} latter opinion, Cro D 270-
and according to ym, y vendors creditors may in yd last case Bull R.P.
may treat him as executor de son Tort. and yd last 258-
appears to y y correct rule Est. quastio vocatur - 542-

A fraudulent sale regularly void y vendor, and he responsible,
18. it binds no executor - But yet y vendor may claim, as Cro Elv 810-
such a sale in favour of creditors, 18. they may claim, yd here Rob. 643-47-
are not assets sale to satisfy y vendor's creditors, y 657-
vendor - This was thus decided in Court, and thus has 5 Co 270-
been recognized by y Sup Ct

If an heir makes a fraudulent sale of an estate descended 5 Co 60-
to him to defeat y creditors of his ancestors, yd conveyance Plow. 441-
is void under y St of Elv 13. This ant within y letter Popham 155-
but y spirit of y St. Rob 601- 2 Leon. 11-

Same rule holds as to fraudulent sales of y Personal Cro Elv 405-
assets made by executors &c Rob. 601- 09. n.

It may be asked, what wd be their remedy, if y property
was consumed or destroyed - Their remedy is in Equity -

2. Bern 616-

That it will remain y property unt y house of, under,
and that uni will be liable for y creditors -

1. atk 463-

2. Pym 149-

59

That a bona fide purchaser of y assets from y executor
will hold y assets as all y creditors & y testator. Their remedy
is only against y executor only and if he becomes insolvent or
absconds, so yt he can't able to respond, it is yr loss,
and not a bona fide purchasers under him.

and if creditors or next of kin can prove collusion
between executors and debtors to diminish y assets,
they may by bill in Equity prevent payment of debt
to y executor.

Cro. J. 270-

9 Mod 80-

3 Co 12-

Hobart 166-

2. Pym 222-

A fraudulent conveyance is binding not only upon y Grantor
and his representatives, but also all persons claiming voluntarily
under him. So yt it binds not only his heirs, executors
but also his devisees, legacies, and persons claiming
under y estate of distribution.

9 mod 80-

executory Use!
Same Rule in Equity, as to voluntary executed conveyances -

1. Pow B. 341-

2. Pym 248-

amb 466-

3 Br. Chy 12-

But voluntary executed ⁱⁿ agreements are not in general
enforced in Equity, for it wd not in gen bind y Grantor himself.
Rob 660-

and when on y death of a, administration was granted to
B, who pending a suit for y repeal of his letters of
administration, sold y assets, y sale was held valid,
as was y adm^r post appointed -

347

Therefore where y Grantor attempts by a collateral act to
defeat a voluntary conveyance of his own, Equity will
in some cases enforce y conveyance vs him 1. P. Wms 577-2 Vern 69-
1. Eq. Cas 168.

No one can defeat his own actually fraudulent conveyance 1. Vern. 100-
by his last will and testament, even tho he shd devise it 132-
for y payment of debts, for as between him and y Grantee, y deed 1. atk 625-
is not fraudulent, and atk he devised it for a meritorious purpose, Pre Chy 182-
purpose, it makes no difference - Still y creditors of y donor Amb 264-
might set it aside - 464-

A. Made a voluntary settlement on his wife, and afterwards
cancelled y deed, it was holden to bind him in Equity

But any equitable interest remaining in a fraudulent Grantor
will pass by a subsequent voluntary conveyance, or y Rob. 373-
if a man makes a fraudulent mortgage and then executes 607-
a voluntary conveyance of his Equity of redemption, it is good - 60

For y latter part being only of y equity of redemption, is not
inconsistent with y existing mortgage. Each is valid good
y other. Neither can set y other aside -

So if y voluntary conveyance had been before or post
a bona fide mortgage -

And if a ~~will~~^{deed} has been unduly obtained, relief may be had
vs it in Equity by a person claiming under y will of y Grantor

And a voluntary bond is good in Equity (for a sum certain)
if it don't interfere with y claims of bona fide creditors -

Neither y obligor nor his representative in gen. can set it aside -

As to y specific execution of y executory agreements, see Rob 661 -

Lines of Fraudulent Conveyances

3.71

Propag. Quare Clausum Fregit
 Brevoir Licence - Subsequent unlawful
 use and Doctrine of Relation 354.

Who can maintain this action 356.

Tenants in Common and Joint Tenants
 362 Against whom the action lies &
 e. Converso. 369. Pleadings 368.
 Evidence. 378.

Trespass upon a person's right.

Trespass in its most comprehensive sense, signifies any transgression of law -

As considered under y present title, it means, Entering on another's land &c with lawful authority & doing some damage
3 B.C. 209 -
Com Dig Tres A. 2
u. 2.

Every unauthorised entry on another's land, is called a "Trespass by Breach of his Close" and implies some damage
3 B.C. 209-10-
As - Tearing down hedges, and y implication of law can't
be rebutted, even tho' no damage is incurred -
Esp Dig 380-
Fletcher 87. 88
88.

Even tho' one shd enter on land covered with snow -

In certain cases however an entry on another's land with licence, is allowed by law - Thus to execute legal process - 6. Co 146 -
to demand or pay money payable there - to distrain goods - 3 B.C. 212 -
by a reversioner to see an waste be committed - to get
refreshment at an inn - vide P. 20, 21.
Esp 2. 380 -

So if one lease land, excepting y trees, he may enter the land
ym and take ym away - Deed 388 -
11. Co 46 -
11. Co 52. a -
Touch. 89 -
Esp Dig 381 -

So hunt ravenous beasts, wh y public good requires - Cro. J. 321 -
This right is allowed not for y good of y individual, but for
y Public - 3 B.C. 212. 13 -
Contr Com Dig 3. 2. 2 Roll 558 - Esp Dig 380, 1 R 334 -

But y hunter must not dig for ym in another's land -

Ferret of other animals - wh are ravenous - not a heir, Salk 558 -
but - he may a Fox - a bear, 330,
Esp Dig 404 -
2 Bult 61 -

2.

11. mod 75-

Salk 576-

Salk 556-

Esb. 404-

when it starts a hare in his own land, he may pursue it in y lands of B. led there-

note, If an animal "fero nature" is started on my land - and killed there, it is mine - Unless it driven into another's ground, and killed there, it is then y hunter's.

Grossous Licence - Subsequent unlawful use, and Doctrine of Relation -

1. T. R. B. 51)

Contra

He has a right to glean on another's land -

Gillb. Evi. 253- 3 B. 212. Esp. Dig. 413-

But when y law gives such licence, any subsequent unlawful use of y authority so given, makes y trespass "ab initio"

8. Co 146-

Cro. J. 148-

2. Roll 561-

Esp. Dig. 381-

as it is said, y legal presumption arising from y subsequent act is, yt he originally entered for y purpose of committing "Waste" or other unlawful act, or in other words, yt he did not enter under y licence -

There is y reason - See Bar. 102 - is it not rather, yt there is a tacit condition annexed to y licence which is then broken?

3 B. 213-

8. Co 146-

Cro. J. 147-

1. T. R. 12-

The law wont suffer any one to be injured by its licence - as a Traveller having entered an Inn - steals any thing - and may be sued in y action

8. Co 146-

3 B. 213-

Esp. Dig. 383-

But in general a "bare non-easance" can't make one a Trespasser. For by relation it supposes no act - But is a mere omission. Trespass is a tortious act, there must be a "misfeasance" -

8. Co 147-

Esp. Dig. 383-

3 B. 213-

Thus a traveller at an Inn fails to pay for entertainment - y is only a breach of contract - So if he commits slander, or writes a Libel - The subsequent act must itself be a trespass in order to have relation back, to make a Trespass "ab initio"

So if a distrainer refuses to deliver back y thing distrained on tender of Rent. The remedy is quare. P. 3.
5 Bac. 152. Trespass

The last general rule it is said, won't hold if a Sheriff, who having made his arrest on Mesne process, omits a return of writ - For distinction, vide Imprisonment -

The reason is, y^t without return, it can't be given in Qui -

Bacon. Abr. Tres. B-

5 B. 90-a
4 Co. 37-a
1 Wils 171-
Cowp 20-
Salk 409-
489-

In y above view, y^e can't strictly a trespass by relation, for y arrest can't appear to have been originally lawful, Besides when a further act is necessary to complete y^e act which is already begun by licence or licence of law - y omission of it must leave y original act unjustified -

Where one enters on y land of another under a licence or fact from y latter, y subsequent abuse of y licence don't make him a Trespasser by relation -

The entry being legalized by y licence, and y law annexed no condition to a licence given by a party -

co Litt 142.
8. Co 146-
Co Litt 142-
Bac. Tres. B-

To constitute Trespass, it is said y act causing y injury, must be voluntary, for if done unvoluntarily and without fault, no action lies -

Exp 2. 383-
Sts 65-
5 Bac. 185-
G. 1. Trespass.

But y^e rule can't true in cases, in wh y act complained of is not committed by Def himself, for y law don't regard y intent, but it wd tend to mitigate damages -

Hob. 134 -
Exp 5. 399-
Salk 13-110-
119-

Hence an infant, idiot, lunatic are liable civiliter in Trespass at any rate, it can't be true, y^t y wrong must be voluntary

Doug 649
1. Tort. Dam. 81-
2 B. & R. 896-

4. Burr 2092. This rule then only applies in cases in which it is not
 Lack 13.110- committed by y Def, but by some other Agent, to whom
 119- he stands in a responsible situation. Hence it must be
 Esp D. 383- voluntary on y part of y Def, or y action must lie -
 Rhom 161- "note how ~~voluntary~~ owner, and be liable in yd and similar
 Poplum cases on y ground of negligence in a different form of action,
 vide Trespass on y Case -
 Examp. to y first, as where Defs dog chased Plt's cattle
 off y Def's ground into y Plt's -

Such cases are analogous to injuries done by Servants -
 Mas. Ct Ser. 30 -

This action won't lie for an injury committed on land,
 in a foreign country, y action being local -

4
 4 T B 503- The action for a trespass committed on land, is called
 Sta 646- Trespass, "quare clausum fregit" from y words of y Writ -
 Comy D. L. 2- vide Pado^{house} 2p-54- 3 Bb 209- Com D. L. B. 1-
 Esp 2 462- On a lease, "quare domum fregit"

5-

Who can maintain y action

3
 3 Lear 209- 1. person but he who had y actual possession of y land
 Lack 263- at y time of y injury done, can maintain Tr. Lvi. Cas. Trg -
 2. Buls. 268- The remainder man or reversioner cannot -
 Bac. Ab. T. C. 2- Esp D. 383-464. Comy D. L. B. 3-

For y trespass is an injury to another's possession and y action
 of Trespass is adapted only to y invasion of another in possession,
 and it was adapted to yd case exclusively -

Title - The right of possession will be vates to support y action
 vide Ejectm in Court, if no other possession is had -
 65-

And it is said, yt y possession must also be lawful, and
 yt an intruder can't maintain y action - 2 Leon. 147-
 4 Leon 184- Plow. 546- Bac. T. C. 3- 6

But it seems, yt y Rule holds only between y wrongdoer
 in possession and him who has yt right of possession - 1. East 244. 46
 For it has lately been held, yt any actual possession is satis. 3 Burr 1563-
 As support y action vs a wrongdoer, but not vs a person who 1238-
 having y right of possession. Then Tenter - 11. Co 51. B-
 Esp. D. 403-
 4 Leon 184.

The person in whom y title is, can't generally maintain
 y action for injuries ^{done} to it, while in y actual possession of
 another - actual possessor. in y case being necessary -
 Bac Abr
 Tress C. 3-
 4 Leon. 184
 Comyns 2
 T. B. 3-

Thus if land trespassed on, is in y possession of y Lessee
 for yrs, he and not reversioner must bring y dett'dl - action -
 So can heir ni he has entered - Esp. D. 404-
 Bac Abr. T. B. 3-
 Com. D. T. B. 3-
 2. Roll 553
 Com. D. 553
 T. B. 3.

If y party in possession is a wrongdoer (see distinction Post
 and case of Tenant at will) according to y theory of y law
 he can't ^{bring an} action vs wrongdoer, tho y possession of y 3^d person was
 unlawful, but in y case he may post regaining possession
 maintain y action by fiction of law - tho not possessed
 in fact at y time of y injury - Post 52-

an heir can't maintain y action, ni he has acquired y
 actual possession by entry, tho he may make a lease 'fore -

YLN Rule - is yt a person dispossessed of land can't & before
 reentry maintain y action for an injury done to it
 between y time of dispossession & reentry - quia he was not
 in possession at y time of y injury - Goetmt 81-
 P. 58-
 Esp. D. 418-
 Com. D. T. B. 3-
 2. Roll 533-
 Bac Abr. T.
 C. 3-
 Com. D. T. B. 3.

But suppose the estate is sold in the meantime, so that the
 Com. D. L. B. 2. can't enter, in which case he may have action to revestate
 2. Roll 550-2. in the case of a tenant "for years" When y. Estate
 Due to "st" dies in y. meantime - ex v. 2. 51. L. 7.
ex v. 2. 51.

But after y. disservice has rendered, he may maintain y.
 11. Co 51. a- action as y. disservice for such injury, for as between ym.
 Robert 98- y. disservice is after reentry considered by relation, as
 2. Roll 554- having been constantly in possession - as in y. action for
 Bac Ab. J. C. 3- these profits after a recovery in Exdment -
 Pleaders assistant 502--

It is not usual in y. present practice of Masters & Hall
 Comyn D. to lay a disservice with a "continuando" when he may
 J. B. 2. so lay it, but to lay it with Co Litt 257 a 2. Roll 552. 54
 this a "continuando" and still be proper - La Ray 957.
 Exdmt Pleaders assistant 502--

or y. Master on y. whole case may state Specially -

The disservice can't however even after reentry, maintain
 Bull N R 86.7 an action as a Stranger for injuries committed between y.
 Pow M. 73- disservice and reentry - For y. above fiction obtains only
 Co Litt 150- between disservice and disservice -
 11. Co 51. 81- B- as disservice conveys to D. F. or D. F. disservices disservice,
 Cro Elv 540
 2. Roll 554. 79- D. F. is not liable to him, but y. disservice is liable post
 Com D. L. B. 2. reentry for y. whole time -

11. Co 51. a B- Bac Ab. J. C. 2- 2. East 244- 46-

The reason of y. Rule is said to be, that y. purchaser under
 y. disservice is supposed to have paid him a consideration,
 and neither of ym ought to be twice charged -

The last rule however holds, only "Quoad actionem"
 not "Quoad proprietatem" hence y. disservice may after
 reentry take y. profits of y. land wh. grew during y. second

y^e 2^d discein as y^e first - Wherever he may find ym.
as Grass, Corn - 11. Co 51.52. Co Litt 55. B. Hb 152. 5 Co 85. a
Cro Elc 61.464 -

In Court he may bring Treas for y^e property concerned, as
y^e second Exce - disseinor -

The disseinor may before entry have an action to dissein,
for y^e act of dissein, & for y^e first entry, for he was then
in possession -

P. 52 -

So a Treas done before dissein - 2. Roll 553 - Bac Abr. 168. c.
c. 3.

The person in y^e possession either as a Freehold or as a term
for yrs. or an estate at will or by sufferance, may
maintain y^e action - Com 2. B. 1. 2. 2 Roll 551 - Bac Abr. T. C. 3 -

1. East 242.46 - vide P. 5 -

So if any person in actual possession is dissein -

But a Tenant at will or at sufferance is a disseinor, 10 -
can maintain it only as a stranger and not as Landlord,
for y^e latter in other case can enter, when he pleases, and 2 Bl 150.175
distroy y^e Tenancy or discein - Co Litt 57. 1. Selwini 347 -

2 Roll 551 - Bac Abr. T. C. 3 -

After now as Tenants at will, who are regarded as
Tenants from yr to yr - see Estates at will -

Treas of an Estate for yrs, y^e tenant may subject y^e lessor 1. East 139.
in y^e case - Bac Abr. T. C. 3. G. 2 -

If y^e lessor invade y^e lessee's estate, y^e latter may 2. Bl. 146 -
have Treas vs him - Bac Abr. T. C. 3. Comyn Dig. T. C. 1 - Cro Elc 143 -

1 Esp Dig. 402 -

It is said, y^e Tenant at will, can't maintain y^e action
vs any one, who enters under colour of right - Selwini 347. Bac Abr. T. C.
3.

This can't be law now, I G. doubts an it ever was -

God Quere, if y^e defendant was actually a wrongdoer,
for vs such an one any possession is vato -

300
-11-
Com D.T.B.2.
2 Roll 551.
2

a Lessor at will it is said, may may maintain y^e
action as a stranger, if y^e trespasser or injurer of y^e land,
quit y^e possession of y^e Lessee at will is y^e possession of
y^e Lessor, that I presume was a Rule fore y^e change
of Tenancies at will, but it ant now law

There no Tenancies at y^e time, 18. at will are
convertible. to tenancies from yr to yr.

If a Lessor — for yrs reserve y^e trees, he may bring. ⁱⁿ ^{the}
In. Ct. Fi^l for cutting down or injuring y^em during y^e
Ba At T.C.3- term, for by y^e reservation, y^e land on wh^{ch} y^e trees are
is reserved, and thus he retains y^e possession and y^e
Lessee may sue, not only for cutting y^e trees, but for
making his close, (the possession of y^e Lessee ant y^e possession
of Lessor, in y^e case can determine)

24. 25-

If y^e Lessor at will commit voluntary waste, y^e Lessee
may have y^e action as him, for such an act determines
y^e estate and makes y^e Lessee a stranger—

2 Roll 549.52
Com D.T.B.1.
Ba. At. T.B.3-
3 Roll 210-

A person entitled to y^e herbage or pasture of y^e land,
may have an action. In Ct. Fi^l, for a trespass
amounts to it, but he must be in possession of y^e herbage
at y^e time of y^e Injury — 3 Leon. 213-

6. East 602

And he may have y^e action, tho' y^e def entered by y^e
permission of y^e owner, of y^e land, and he may have
y^e action as y^e owner himself—

Com D.T.B.2.
2. Roll 569-
Plow. 431-
Ba. At. T.C.3-

But if it is in any case need not be in possession
of y^e land at y^e time of bringing y^e action, y^e right
action accrues when y^e injury is done. Thus if

As y Tresness, Tenant will, time, he may, will
maintain y action -

The action lies for injury to land uninclosed, and
word "Close" don't necessarily imply an inclosure -

1. Burr 133. 1004. 6. East 154 - Chite Pl. 173. Doctine Student 30 -

The owner of soil in a highway ^{pleads} may have Tr. in "Cl. Tre" for an injury done to it -

The right of soil belongs generally to y adjoining

proprietors - tho' whose land, a highway is opened -

1. Bull. 157. Tr. vs East 11. Error - 18.8 - Ruled

as against y town, proprietors wd not lie -

In Comit. y law - highways is too absolute for
More mortals -

1004 -

1. Burr. 143 -

Exp Dig. 428 -

Dec. Abr. C. 3

T. 3. T.

13 -

If land in y possession of a is sown by B and C
is to have one half of y crop, B. it is said, can't
join with A in a Tres. Pl. - Quia he ant in possession Cro Elvi
before y crop is ^{gathered} for an injury done to it -

2. Roll 568 -

12 7 24

But it is held, yt the right lies for injury
done to y crops, Cro Elvi 143, Tho' not in Tres. Pl. in
Cl. Tre" wh shd be not by A alone - and there
for it has since been held, yt if A agrees with y
owner of y soil to plough, sow and give y owner half
of y crops, - A may have Tr. in Cl. Tre" for treading
down y corn - and if y owner ant jointly interested
in y crop growing, but is to have part by way
of rent after -

Bul N.P. 85 -

Exp. 9. 402 -

Indeed possession of y land belongs to A, till y crops are
gathered (cf. 1st) This is y later opinion and y best -

Husband and wife may join in y action for an injury done
to y land, for such injuries y action survives to y wife. Bar. and Feme

Tenants in Common, and Fe Tenants

50 - 200?

Tenants in Common as well as Fe Tenants and joint
 in Trespass and their land held in Common. The
 C. Lile 198-a action being in Personalty, yet if damage to the
 in real. 2 Bb. 194. 24 Bb 387 - Exp Dig 404.

see Tenants in Common -

See C. Lile 198-a

If a commission of Bankruptcy has issued to one, who has
 not an effect of Bankrupt Laws, and if assigned
 took possession of his land, houses, &c. yet action lies as
 if the commission being void.

For what
Injures it3 Bb. 211-
Bac. T. 5-

Every person is answerable not only for his own trespass,
 but those of his own cattle; and if they by his negligent
 keeping, stray upon another's land, & disturb if he permits
 them, or drives them on, he is liable in an action of Trespass
 "Qu. & Tr." See 181.

15

2. Roll 565

Bac. T. 1-

Shows if they enter through fault of fraud and negligence of
 owner, & land, as for want of satisfaction, as it was
 his duty to maintain.

3 Bb. 211-

Exp D. 386.7-

Bac. T. 5-;

But for trespass, by cattle, a party injured has his election
 of two remedies, He may either distress of cattle as damage
 to the land, & hold them impounded till satisfaction made
 or bring his action.

For what Injures, if action lies and a contra-

One action lies as if a dog or of cattle, and kate some
 opinions, him only - and kate, others, it lies as if, either
 a dog or owner.

But he can't regularly pursue both remedies. Thus if - 16-
 he distress, he can't maintain Trespass and E. Converso, Talk 248.
 He can have only one satisfaction, an election being 12. Mod 66.
 once made, it is binding. Bac. Trespass.

For y's distinction see Alplevin.

12. Mod. 663.

It has been held of a T. in a T. act, that if cattle, 1. Roll 665.
 on y land of C, he may distress for damage done, Bac. Abr.
 see Alplevin. 1. Selwin 407. distress &
 Com. D. P. C. 1-

For he can't maintain trespass as B, the cattle are mere
 instruments of mischief in his hands, still as they are actually
 doing damage, C may have a sur upon them & B has
 his remedy as A. 2. Roll 553.
 553.

If y tree of A is blown down on y land of B, and a Bac T. 5-
 goes to take it away, y's action don't lie as a long entry.
 The falling of y tree isn't his fault, it is by inevitable
 accident, and as he is not divested of his property by
 y's accident, he has a right to take it away.

Scus of y loppings of a tree, wth fell on another's land,
 if y falling might have been avoided or prevented by
 proper caution. The falling of y tree isn't y act of A. 2. Pl. B. 895-
 like y lopping and consequent falling over. The former is
 unavoidable, y latter not so. Doug- 712-

17.

If the timber float on B's land and does damage, it
 it is said is liable - there is negligent - & there liable
 in Trespass on y case -

In case, I presume on y neglect, and not Tress.

If neglect ant chargeable upon A, how does y case differ
 from y last?

Bae T. II
2. Rule 555.

If A's beast very stolen, is put into y close & A & C. A is justified in going after it and no action lies vs him.

Lack. 120-
Doug 719-Arg-
Bae Abr. P. 31.

If y fruit of A's tree falls on y land of B and A goes after it, he can't sue, y falling ed. not be prevented.

This rule contradicts a popular error, viz if A's tree overhangs B's land, y fruit of such tree belongs to B. This is not so, y fruit belongs to A.

This seems correct.

Bull N.P. 85-
La Ray 137-

But if y roots of a tree standing in A's land, extend into y land of B, they are tenants in common it is said of y tree and fruit. Substantia.

-18-

Seems if y roots of y tree don't extend into B's land, they don't shadow it. In y case, y whole is A's, seems as to y first proprietor?

How can it know when and how far y roots extend into B's land? Suppose y more extremity of a root so it extend, what is B's proportion? This rule leads to uncertainty and controversy. - Besides it seems to contradict y last rule.

As an elm. kata y rule, y roots of wh extend indefinitely may be planted in a 5 acre lot, and y roots reach into a neighbour's land - and he wd then be tenant in common. So of Lombardy poplars.

If A's cattle pass into B's land and thence into C's. C may have y action. w. A, even tho they pass through C's fence, wh was out of repair. For C is bound to fence vs such cattle only, as his his adjoining owners

only may put into his use -

If a being bound to repair a ^{bridge} ~~bridge~~, can't do it without going into B's land, he is justified in going upon it from necessity - It is a bridge of the Public - Doe Ab. T. F. 1-

If a has sold trees growing upon his own land to B, & latter is justified in going upon a land, to cut and take ym away - This right is implied in y Sale -
Ante l. Title by deed.

It was holden, yt if one goes upon another's land, adjoining a navigable river to tow a boat, & entry is justifiable. it is for y public good.

But y.s. can't law - it isn't allowed ni by special custom - and we have no special custom - - 81 -
Public Highways 725.
1. Ld Ray 725
6 Mod 163 -
1 Burr. 292. 86 -
3 PRe 253 -
1 Burr 236.

But it seems agreed, yt if a public highway is impassible, travellers may go on y adjoining ground - This is required by public convenience - 119.
Doug. 716. 3. P.R.
263 -
2 Rb Com. 36 -
Com D. Chamie
D. 6. Ferris
234

Where if y adjoining land is enclosed - Ld Ray 725 -
But I doubt an yd wd be considered an exception -
Bl Contra, but yd question has been decided since y time
Bl wrote by y B R -

Sailor vs Whitehead -
Doug.

Bl 36 - Seems as to private ways, Doug 716 - a Person can't maintain yd action for an injury to grass growing on land, ni wh he has a bare right of Common - For tho' he has a right to take it by feed of his cattle, he hasn't y possession, or property (y right is incorporeal) It is a right to feed his cattle on another's herbage - Ba Ab
T.C. 3-

2 Role 552. 2 Rb. 33 -

A disturbed in his enjoyment of his right of Common, he may have Trespass on y. soil, not Trespas, for y land is in no sense his alone (see Trespas on y estate action &)

house -

20-

Entering on another's land without permission or lawful authority, is in strictness a Trespas, And y door be open -

Bac Ab. T. F. 2 -
Plow. 71 -
2 Rolle 555 -

But if a neighbour has been in y habit of thus entering, y frequency of y occurrence might be construed as a Licence -

Cr. Elvi. 246 -
Bac. Ab. P. 182 -
T. F. 2 -

If y owner has unlawfully taken another's goods into his house, y latter may go in after y m, the door being open - The law gives y licence -

Ab. Bac. T. F. 2 -
Ab.

So if ^{one} intent to suppress a riot or a fray - or other disturbance of y peace - causa publici -

Contrary to y - So y law allows one to enter y house of another - y door being open, to pay or demand money payable there - (ut ante) To enforce process of law -

21/2

3 Co. 91 -
4 Leon. 41 -
5. Bac. Ab. T. F. 2 -

And a house may be broken into y purpose of executing criminal writs - where y sheriff first demand admittance and declare y cause of demand - But I know he will be a Trespassee - see thing - &c -

5
5 Co. 91 -
Cowp. 1 -
Cr. Elvi. 909 -
Hobart 62 -
Esp. Dig. 604 -
Est.

But a Sheriff can't demand justifying y breaking of an Outer door or window of another's dwelling house, for y purpose of arresting his body, or taking his property on civil process - ^{ie to execute civil process -} his house is his castle -

Bac Ab. T. F. 2 -

But y privilege of castle is construed very strictly - It extends to no other y outer doors - & windows - not to inner doors, chests, trunks, &c. These after demand made and refusal, may be broken open

The Writ don't hold as a writ of Habeas corpus "24"

Further directions see "Sheriffs and Bailiffs", 1

An officer is justified in breaking a house to execute a legal Search Warrant.

But all gen search warrants are illegal and furnish no indication, they are simply void - is a warrant to search for goods in all suspected places -

But as y law is now settled, no such warrant is legal, ni it issued under y following restrictions - First. The party applying for it must make oath t^y y pret or n^o application is founded, and kata his belief, y goods are concealed in such a place - 2^d It must be executed in y daytime and by a known officer - 3^d It must be executed in presence of y informer -

The warrant being legal, y party who obtained it is justified or not in y event of y affair - t^y Magistrate are justified, whatever y event may be -

The party assumes y danger -

This action won't lie vs y Master or Seamen of a Public ship or Privateer for taking property as prize on y sea - tho' y property may have been adjudged not lawful prize - For y question of prize or not belongs exclusively to a Ct of Admiralty

Note y relates to Personal property.

Against whom y action lies and e converso -

It lies not vs a lessee for yrs for cutting timber, nor for cutting and carrying away - The t^{est} is not in possession of y close - The remedy is by writ of Waste -

4. Co 62.
Litt P 71-
Exp Dig 401-

But if it is being cut, they are refused to remain a time, and then run away - Trespass as y lessee will lie, not indeed for y cutting, but for y carrying away - This is not however. Tre. qua. Cl. To " The property is then a chattel because, y lessee has y possession in law - In y case trover is concurrent with Trespass - vide Trover - now if y cutting and carrying away are one continued act -

Exp
Exp Dig 400
C. Lile 37. a.
Co.

If one lease land in y trees, y lessee is liable in trespass for cutting ym, The lease doth entitle him to y possession of ym - but he ym he is a stranger - See P. 11-

J. Co 13. C
 "25" Exp Dig. 400
 Co Lm 57. a.
 Lm Sec. 71-

- as yet action lies for a year at will vs y issue for cutting timber trees upon y land - The very act determining his estate, and his possession as lessee -

To find out other possible injury to subject -

There do these rules hold of finances from yr to yr - when
in modern construction are substituted in finances at will &

2, P^oC, 130-
E^ob Dig. 400-

But it lies not on such cases as a Tenant by sufferance -
 viz, a lessee has ^{entered} interest - & we can't determine his estate
 of course before entry, he isn't a disseisor, or stranger, but a
 Tenant in possession -

Ld Ray 739 -
Esp Dig. 400 -

They lines are excepted in a lease for yrs, (at Gupna).
But if injured or destroyed my w^{ild} cattle, y^r action
don't lie - for y^r lease has a right of y^r soil - and a
right to put his cattle upon it -

'26-
Robert 134-
Lack 13. 110-

This action will be as a kinetic ^{re} motion and necessary.
The intention and regard. — Bac L. D. 2.

Every person concerned in a trespass, is liable to a action.

As Aider, abettor &c, These are no accessories - all 1. Hales Pl. 16.
Principals - 5. Bac. 185. 2. 1. 124 - 4 Hb 130 - 1. JHB 613-
223- as if A command or request B to commit a Trespass -
and he does it - it is well as B is guilty of a Trespass - Bac. Abr.
and liable -

If A agrees to a Trespass committed for his benefit by B, he, A, is liable, tho' he didn't command or request B to commit it - 5 Bac. 185. 4 - The word "agree" is synonymous with the word "assent" - Qui non prohibet, subest -

How far a master is liable for a Servant's Trespass. see Master and Servant -

If several join in a Trespass, & party injured may bring 27. ---
y action vs one or more or all of ym - P. 31. 8. Co 159 -
Bac. Abr. T. G. 1 - 5 TR 649 -

It is said by Bacon, if y party injured has brought y action vs one of ym, he can't bring a second action vs another, for y same Trespass, & y pendency of y former is a good plea in abatement - Bac. Abr. T. G. 1. 1. 192. Bac. Abr. T. G. II 1.

This isn't law, he may sue each in a separate action -

But he can have but one satisfaction, one recovery of damages - Robert 66. yelver. 67- Esp. 8. 415- 4 Bac. 115-

Therefore a former recovery vs one of ym, is a bar to an action brought vs another of ym for y same Trespass - Cro. J. 73 - Yelver. 67. Bac. Abr. T. G. 1 - Cro. Elvi 30 - Bac. Abr. II 13 Pleds - Esp. Dig 415- Quod mirum? That where a judgment has been recovered vs one, y Plt may sue another and recover vs all - 3 Comnt R - and elect y verdict wh gives him y highest damages -

It is said also by Bacon, if an acquittance by y defendant, - 12 where in y first action, is a good bar to y second - 5. Bac. Here a Pl Trespass. 185. 7 - cites Cro. Elvi 66- 8. wh don't support y proposition -

It ant Law nec~~esse~~ unquam fuit—

If A's cattle being agisted by B, break into C's close, & is liable and liable to some opinions B only—

Pae Abr. T. G. 2.
2. Role. 46-
Ep. Dig. 387-
Penks. 161-

If A's cattle pass thro' y' forest of B's fence into y' close of B, and thence thro' y' direct of C's fence, C may have Trespass vs A, for C was bound to fence vs such cattle, only, as B shd put into his close. But A may then have case vs B—

Pleadings

Bac. Ab. T. II. 2
Bull. II. 31-

Where y' Trespass consists of an abuse of authority given by law— it is satis to state y' trespass generally in y' declaration, and if y' Def. justifies in his plea, y' particular injury or abuse of authority comes out in y' replication—

Cal. 221.
Ep. Dig. 405-
3 T. 6. 292 -
1. Do 479-

As Trespass for breaking a house and taking goods, breaking furniture &c. Justification of y' Entry— Replication stating a subsequent wrong by new assignment

Talk 119-
Lr 61-
Bac. 192-
Ep. Dig 407-
Bac. II. 2-1-

The Plt^y may include several distinct trespasses in one declaration, as cutting Trees, breaking his house, destroying his goods— &c. But in different counts, in y' whole was one continued Trespass—

1. Str. 61-
Cro. James. 664-
1. Talk 119-
2. Do. 642-
2. Burn 1114-
1. Telm 225-
Contra
10. Co. 130-

and to show how aggravated y' trespass was, and thus to aggravate y' damages, y' Plt^y may join in y' declaration, and in y' some count, a wrong for wh he cd not maintain an action— as breaking and entering his house, and beating his servants— In y^s case y' beating is not a substantive ground of recovery but mere aggravation—

There, can y beating &c, with a "per quod" be joined in
both cases - Esp. 407 -
Carr 113 -
4 Bac. Pleads 12 -

Undoubtedly it may, when y whole injury (gist and grievance)
is one continued wrong - After on principle, if y beating &c
was a distinct act done at a different time or place - It
wd then be as to y master a separate wrong, and of a different
kind -

2 RR. 666. La. Raym. 1032 -

It has been ruled ergo yt it may be joined, when it can be
treated as a part of y transaction, of y same transaction - as in
y case of a house broken and Servant beaten - per quod &c -
It is only a continuance of y same trespass or wrong
accompanied with beating - This a Trespas in y Case -

And if no "per quod" is said, there can be no recovery for Salk 162
loss of service, if no ev. of it shd be admitted, because it is not 8 RR. 133
admitted - 9. Co 113 -
2 East 154. 1. Chy. R. 386. 1. Saunders 348. a. b.

In Eng. however y form of action for "beating Servants, per
quod" has by a partial confusion of y principles of beatings,
become "trespass vi et armis" even where y beating is an
isolated act - It wd seem then yt such a count might
be joined with "In & E. Inq. it" or dem. Tre. But y can
be vindicated only by precedent -

material

The day laid in y declaration is not mentioned, y trespass may be Co Litt 282. a.
proved on any day before y commencement of y Suit - Esp. 407. Cro Eliz 32 -

To y action may be brought as several for a joint Trespas or
each separately in a separate action -

But it is said, yt if it appears on y face of y declaration
yt a certain known party or person was not sued, was party to y Trespas

Hob. 164-100- with y def. y declaration is ill - 1. Leon 41-

1. Saunders 291. D. Salk 32. 6 PR 766-

There as to y principle - not law (Sompse) nor y law requires
 allows a separate action vs each of y trespassers and what
 is y objection to y's appearing in y declaration?

1. Leon. 41- It is allowed by all, yt if y declaration charge y wrong
 to have been committed by y Def together with another, to y
 Bac. Ab. I. 1. y Plt, unknown - it is good -
 2.1-

But it makes no difference on principle, an those not
 joined, are alleged to be known or not -

Page 33-

in y return party
 The practice is, to take no notice of any person to y loss as
 not joined as Def, and there is no need to mention any
 other y Def - The act of all is a set of each

Cart 390
 4 Bac. 11-
 5 do T. I. 1.
 Salk 36.40
 1 Show. 28-

The writ used must be a writ to be done with "force and arms"
 "in et armis" and by force - These at S. I. are matters
 of substance - and a verdict wd not aid yr omission.

Bac. I. I. 1-
 2.1-

The reason of y rule is, on conviction of a wrong committed
 with force, y Def was at law fined - The judgment a
 "capiatur" shows if y wrong was not forcible - as in actions
 on contract - is on y case - for y judgment was a "truncat"
 y Def amended -

Plid.

Salk 636-
 Esp 3. 405-

But by T. 16.17. Charles 2, y omission of these words
 may be amended after judgment or rather verdict - 3. Bac. 191-
 But y declaration was ill on Yen Lennur -

and indeed by T. 5. 11. 12 and 13, y "capiatur for
 fine" was taken away and y difference between y judgment
 in y cases of cases, ("ante") destroyed - The Plt on A.
 signing judgment, pays 98. for y fine to y Crown - and
 recovers it back as costs from y Def -

It has once been held by Lord Holt, & since by us, & needs
"in armis" are not necessary. Ld Ray. 985-985.

In Court these words are not on principle matter of
substance, there is no force, no capiatu, no difference in
judgments, no such thing as it is 5th Hill and May.

The Sup. Ct of Court once decided, at a declaration setting P. 33-
both sets of words, was good on special demurrer. *See* *Wright*
vs Phillips 1796 - at writ of error was prayed out, but not
procured. *See* *Quinn* - Such a rule tends to confound forms
of actions.

It is a general rule, that in writ of trespass w. tort, must 225.
be specifically and specially alleged - in declaration - *For* *Ex* 1. *Selwyn* 225
can't be given of any particular wrong - as it is specially Bac Abr. II. 2.
charged - as *Indrass* for breaking & entering house, & also *enormously*
feet - Taking and carrying away his goods, not provable - 36-

The rule is relaxed, when an action arises ex "causa"
to avoid indecency -

The declaration must state the value of the thing, for taking or 1. Selwyn 39-
injuring it, & action is tort - as *grass* trodden down - 2. Lev 430-430
true value not necessary - but *jury* won't give more than Ex Dig. 407-
laid in declaration - 3 Ld Ray 113-
Heds abt. 488. 87-
- 97-

But it isn't necessary in all cases to state any quantity - Cro P. 435. Bac. T. 2. 1-
as *carles* eating *sear*, destroying *herbage* - *See* 1.

But omission of allegation of value, is aided by verdict,
On principle it is clearly aided for a verdict must be intended
to have found the value - *Secus* it wd be impeaching of *jury* 4 Burr 2455.
integrity of *jury* - Cro P. 130- Ex Dig 407-

37.

Ld Ray 240-

2^d Roll 4453^d B6 212

Bac Ab. T. § 2.2-

Bac.

In trespass of a permanent nature, where injury is such, as to be capable of renewal or continuance & where it is renewed or continued on different days, y^e P^l may recover for y^e whole, in one action laid with a continuance or "continuation" -

Exp Dig 407. 17. - This may bring a separate action for each day's separate injury -

Saying y^e action with a "continuando" is alleging y^e injury to have been committed by continuance, from one given day to another.

2 B6 212

Exp. Dig. 407-

Examples usually given, which may be laid with a "continuando" - Consuming or treading down grass or herbage of any kind &c

These are capable of continuance or renewal (ut supra) The principle or rule is, when y^e particular injury done by each & several trespassing acts, can't be easily distinguished from y^e rest, all may be laid with a "continuando" - After where several acts are easily distinguished or distinguishable -

Form of continuance

2^d Lillys Entry

444-

as cutting trees, digging in different places, on different days &c -

Ld Ray 235. 970. - Salk 638. 9. - Bac T. § 2.2.

1 Saunders 23-

1. Saunders. 24. n. 1. 1. Chitty Pleas 232. 38-

But in these cases, y^e trespass may be said to have been done on several days, and times" between such a day" and such a day" not

2 3. B6. 212-

2. Salk 638. 9.

continuing - Ld Ray. 823 - 1. Saunders 24. N. 1-

39-

Ld Ray. 240-976. 77.

But if several trespasses are charged & only one ^{day} laid in y^e declaration, no writ can be given in y^e acts done on one day - Salk 639. Exp Dig 408-

Bac Ab. T. § 2.2.

Comys Dig T. B. 2-

Ld Ray - 240-

Ld

There are two ways of dealing with "a continuando" - First y^e trespass may be laid with "a continuando" for y^e whole time from such a day to such a day" and y^e mode was proper, when y^e trespass was continued with

3/4

intermission - for a longer time than one day - as if cattle
continue on D's land several days

ill cond. When y several acts are not committed in continuance -
but by intervals and on different days, they shd be laid
by continuance on diverse days & at diverse times - from such
a day &c. between

But y particular intervening days need laid -
as destroying herbage on different days, but not continually -
there is y distinction attended to in practice 5?

When there has been an ouster & possession and reentry,
y ouster and all acts done under it may be laid with a
"continuando" in which case y Plt is considered by legal fiction
as having been in a continued possession - Cro Elvi 182.
Salk 638-
Ld Ray 979.
979.

The def's trespassing possession having been continued,
and if after reentry, y Plt has been again ousted & again
reenters, he may lay y whole with "a continuando"

Or y Plt may set forth y ouster as y whole case specially - Ld Ray 977-
P 7-
Pleading 302.
302.

If trespasses wh can't be laid with a "continuando" are
so laid, y declaration is ill, even after verdict - For y allegations
made in yt form, cannot be true and are ergo not Esp D. 408-
aided by verdict - 1. Levins 210 Salk 639 - Bac Abr. T. J. 2. 2 -

But if some of y trespasses laid with a "continuando" may be
so laid and others not, y declaration is good after verdict, n.a.
"tho y damages are entire", for it shall be intended y t 1. Saunders 24.
Ld Ray 240-
y damages were assessed only for y former -

Salk 639 - Esp D. 408 - 1. Selwyn 375. 3 Lev. 94 -
There is y intention correct in principle & It don't seem so -

The general issue in y^e action, is "not guilty."

and in almost all actions sounding in tort
And if a person indicted for a trespass has confessed,
and y^e entry of his confession has been made upon y^e record,
he is forever after estopped to plead not guilty to an
action brot on y^e same trespass.

- Co Litt 282.
1. Sto 61-
Ld Ray-732.
1. Falk 287-

At C Law. a special justification must be pleaded specially-
not given in Eve under y^e general issue - for y^e Gen issue
denies y^e facts and a justification admits and ~~avoids~~ ^{avoids} y^e Gen
y^e Eve is not consistent with y^e plea - As Legal Process -
discrepancy

2. Roll 676-
Esp D. 411-

But y^e Def may give in Eve under y^e General issue,
a lease for y^ers from y^e Plffs to himself, for y^e disproves y^e
material allegation in y^e declⁿ viz^t y^e Def broke
y^e Plffs close.

1. Falk 4-
Esp Dec 411-

So on y^e general issue, y^e Def may prove y^t he is tenant
in Common with y^e Plff, for y^e action don't lie between
Tenants in Common - But y^t y^e Plff is tenant in Common
with a stranger to y^e suit, shd be pleaded in abatement.

1. Falk 408-
3. Lev 20-
1. Ld Ray 733,
1. Falk 107. 409.
Esp Dig 411. 412.

A Sheriff may justify under final process without pleading
y^e Judgment - He must obey y^e writ, and y^e original Def
is privy to y^e Judgment, and need not be informed respecting
it - But if y^e action is brot vs y^e Plff in a former action,
or a stranger, he must show y^e judgment as well as
execution, for y^e judgment may be reversed - & if he take
execution afterwards, he is at his Peril -

The Plff, in y former action is bound to y judgment,
ergo he must show and a stranger being a volunteer he
acts at his peril -

any Person acting, in aid of an officer at his request,
may justify as y officer may do, but y request is traversable -

If y action is brot by a stranger to y original judgment,
vs y Plff acting under y execution, he must show y
Judgmt - Secus if brot by y Def in y execution -
as Plff breaks y house of A. to arrest B - A brings
trespass -

Accord and satisfaction is a good plea in trespass but an
accord alone is not - a defence in yo nor in any other
Esp Dig. 415. Doctrina placitandi 19. 1. Roll 128.
9. Co 80. B. Str 373.

So an award of arbitrators - Cro Elvi 66.

A Release is also a good plea in bar, but if release before
action brot is pleaded, there must be a traverse, yt he
is guilty afterwards and before suing out y writ -
Esp Dig. 415. Hob 104 -
Ld Ray. 222.
Salk 222 -
2d Ray. 229.

And if y action is brot for a joint trespass, a release to
one is a discharge to all, each is answerable for y act
of y other - Hence a release of y trespass to one, operates
in favour of all - Hob 66. 232.
Co Litt 232.
3 Co 97 -
Cro. 444 -
4 Mod 379.

But if y action is brot vs two who sever in pleading,
and one is found guilty and damages assessed, y Plff
may enter a nolle Prosequi as to y other - Hob 70 -
Cro. 211. 16.
Esp Dig 415. 16 -
1. Saunders 201. a - East 19. 1. Mils 30.

It is no discharge of y damages, y suit vs y former,
is at an end - Recovery has been had -

It is now settled yt nolle prosequi may be entered as
d above in y earliest stage of y action, and y other def

are not discharged - it ant in y nature of a Retraint -

So if y P^t has sued only one of several It trespassers and recovered judgment is him. This is pleadable in bar to an action post trōt vs y others - For there can be but one recovery -

1. ¹ Str 549 -

2. ² Roll 370 -

2. ² Falk 686

By St 21 James II y Def may plead in bar, a disclaimer, and yt y trespass was by negligence and involuntary, and a tender of satisfaction amends before action trōt, but he must plead what sum he tendered -

(So in Rhode Island)

It extends only to cases of involuntary trespass, and disclaimer -

There is no It in Comt and such a defence is untenable to y Law -

Esp D. 416 -

The It of Limitation is a good plea in bar. Six yrs in Eng by St 21 James II. It must be specially pleaded in Eng - (In R. I. 4 yrs.)

3 Bb. 309

10 - Co 90 - 91 -

Laws on Pleading

51. 126. 138.

150

pleaded.

Specifically

The plea of title in trespass amounts to y Gen Issue - and is ergo not allowed^{to be} - Still it may be specially pleaded by giving colour - See Pleadings -

In Comt a special plea of Title is warranted by St tho' it may be given in Eng under y Gen issue

In y County Ct. y Def must abide by his plea of Title - he cant change it -

It has been determined in Comt, yt a judgment on y plea of Title, is no bar to an action of ejectment by y unsuccessful party and don't conclude y plea of

Title (Rury 395) Verdict being of a higher nature C. C. 7.
 Sed Quere, for it is conclusive as to y same
 fact or title (wh was first in Issue) in any
 future action as an Estoppel—

Title may be given in Evi and tried under y Gen
 Issue before a single ^{magnate} juror in Court. The 2d
 don't import to decide y Title. (Lear in R.I.)

As to a new assignment— see Pleadings—

A verdict or judgment when given in Evi under y Gen
 issue, is no Estoppel, tho' good Evidence

Evidence

The Evi must follow y issue, & no matter go to y merits—
~~but~~ embraced by y issue, can be given in Evi.

2. Pl. B. 1163-
 3. Burr 1385-
 Esp Dig 417-

But under y general allegation of "alia" enormia y Pltff
 may give in Evi, y Gen Issue, of any matter of aggravation, ²²⁵⁻
 wh will not itself support an action— as Beating ^{1. Selwin}
 y Pltffs family, but no evi can be given of a substantive ^{2. Burr 1114-}
 fact, wh wd itself support an action for y Pltff, ni ^{Esp Dig 417-}
 it is alledged as Breaking house, destroying furniture—
 and beating y Pltff— 31-

51-

If y Pltff set out y abuttals of his close, he must ^{prove} ym
 as laid— But if an abuttal is laid to y "East" ^{2 Roll 667-}
^{Yelverton 114-}
 proof yt it is "East" is satis— 114.

When y action is laid with a "continuando" y Pltff must
 confine his evi to y time laid, quia it enters into

1. Chitty 258.9-
1. Sam. 24. n. 1-
1.

y description, but he may waive y continuance, and prove a Trespass any day - B. N. P. 86. Esp. 417-

Or he may give Evi of only part of y time, laid with a 'continuando'

from one to another 31

The reason. I suppose, is, yt laying with a 'continuando' is descriptive of y Trespass - But laying a particular day for form, is not -

Bull. Nisi P. 86-

is 'with continuando,'

Esp. D. 418-

When it is thus laid, in case of an Ouster of y P^{ty} he must prove a reentry. Secus he can recover for y first entry only - This rule holds only, where y P^{ty} has been ousted - T. 9. P.

If a P^{ty} make a new assignmt and y general issue is pleaded to it, he cannot prove y Def guilty of y Trespass at y place mentioned in y plea in bar - yt is waived - Esp. 418 - Cro. Evi 499 - Lowes 241 - where y Trespass newly assigned are alleged to be at a different place from those justified Lowes. 241 - 64 - They are gen so alleged - not always - Gumble Lowes 164 -

If they were how ed one or more a Trespasser by relation, by a new assignmt, where y acts justified and those newly assigned are one transaction? Entering house, Breaking furniture -

Yelv. 148-

Esp. D. 419-

If on a plea of justification, y Def prove so much as is amounts in law to a justification, it is satis, tho' he don't prove y whole as pleaded -

When y action is by a stranger to an execution is a thing -
who acting under it, has committed a trespass. The
Plff must show in evi a copy of y Judgment Secus, if
by a party to y execution, as y Def in it.

As to severing damages, where there are several depts, see
Wault and Battery - Ep 420

for Cost vide So Count 677 -
- 110

38.4.14

Juster and the Remedies.
Ejectment and Disseisin

For what Things Ejectment lies 393.

Who may have the Action 394.

Pleading 402. Evidence 404.

Verdict Indemnity 406.

The Recovery of Mesne Profits 408.

58- Post however when y lts of Equity began to combat y
 3 Pl. 202- gector to make specific restitution, y lts of law also adopted
 Appx 202- y same mode of doing justice rendering judgment for yr
 recovery of y Term, and issuing a writ of possession. Tho
 y declaration still demands damages only-

1 Root 438- In Count y land is demanded and y demand is held
 necessary-

This practice of y Eng lts seems to have been adopted
 is early as y reign of Edward 4th. Since then, y ~~new~~
 remedy has been specific-

And for a long time past, tho founded nominally upon
 2. Burr 668- y ouster of a term only- has been in Eng, y common and
 2. Pl. 200. 1. 5- almost y only method of practice of trying y possessory
 Bac. Abr. Ejt. a- title is Real Estate - It has been usual for ys purpose
 ever since y time of Hen 7th-

This is now done by a string of legal fictions, wh are
 delineated 3 Pl. 200. 5- Bac Abr. gectmt A-

They have no such fiction in Count. The Freehold
 is recovered directly by action of disseisin-

3. Pl. 205- Since ys action has been thus used to try y lessor's title
 Bac ejt. h. 8- y damages are recovered are usually but nominal-

6. Co. 7. 3. Pl. 187. In real actions ni in apside, no damages are recovered.-
 Co Litt 257- Bac Abr. gectmt a. h-

For what things gectment lies?

Ono Elvi 492- This action will not regularly lie for any thing, of wh.
 3. Pl. 206- y Sheriff can't deliver possession on y Execution, or which
 Bac. Gectmt D. is y same thing for any thing so wh an entry in fact,
 can't be made-

In general, ergo it won't lie to recover incorporeal hereditaments, 99-
or things lying in Grant merely - as contradistinguished from Bull & Pious 93
things lying in Seizure, Cro P. 146. Bac Abr. eptol. B. Pl. 24. Est. 427-

But it will lie for land laid out, as a highway, in 399-91
favour of y owner of y soil - for laying out as a highway 1. Burr 143. 3 Bac
don't divest y right of soil - But y land is recovered 1. The highway
subject to y Easement - Y. 2 & Pregit 12 -

So it lies in favour of y Grantee or owner of y herbage 61-
of land, tho y soil belong to another, for possession belongs Cro Ch. 162 -
to y former, until y crop is taken - Du Creg. 11. 13. 28 -
Bac Abr. G. B. 1- Str 1120 -
Hurdner 303 -
457-

But it won't lie for a watercourse or a stream of water, yels. 143 -
"ex nomine", for it is fluctuating and possession can't be given Bac Abr. G. D. 1
of it - Shd be "for so land covered with water" Esp. D. 428 -
Stopham. 107 -
2. Pl. 3. 15 -

The action need not be for y whole of an Entire thing,
It will lie for an entire part of a Close or building - Str 685. Esp. D. 428 -

Who may have y action?

'Tis a general rule yt no person can maintain y action, ni 3 Pl. 205
he has at y time a right of Entry (y action being founded Litt L. 5. 98.
on a right of possession) For y lessor of y Plf is supposed Esp D. 430. 447.
to have entered and made a lease (by fiction) yet ys 3 Pl. 179. 81 -
fiction won't aid him, nor will an actual Entry, if Bac yet a -
he has no right to enter.

The ultimate right of property in y Lessor is tried in Eng
by a Real action - As Tenant in Tail always in fee,
and dies, tis a discontinuance, and y heir can't enter, and of course

300.
2. Bl 171:72. 91.92- he can't maintain Ejectment His remedy is by action
Litt Sec. 585- Real- Eject 491-

3 Bl. 205- So if y lessor or y Plt, or those under whom he claims,
Eject. 431- have been out of y possession 20 yrs in Eng, while having
Bac. Abs. Eject a- y right of possession, he is barred of y action by y St-
Bull 102- of Limitation, 21. James 1- wh takes away his right
of Entry - and y Plt must prove possession in himself
or those under whom he claims -
The Def need not plead y St- 1. Burr 119. Rummington 234 -

3 Bac. Limitations This St has y usual Savings in favour of infants, femes
Covert, persons insane, imprisoned, and beyond Seas,
In Eng 10. yrs are allowed Post yor disabilities are removed.

64-
6. East 83- If y St has begun to run, i.e. if y person claiming was
4 P. 300- under no legal disability, when his right of Entry first
4 accrued - a supervenient disability won't save y title -
The disability in y Proviso being only such, as exist,
when y right of Entry first accrues -

It has been decided in England y successive disabilities
can't be joined within y Saving clause, so as to prevent y
St from attaching - For y only disabilities contemplated in
y Proviso, are those existing, when y right of Entry accrues -
i.e. first accrues - 6. East 80 - 4 Mass R 182 - In Comm

Rush vs Bradley Ct of Errors - 4 Day 298 - Contra -

But a majority of y Ct post were in favour of y Rule -
before

the possession & entry of y Plt within 20 yrs post action
not, under y Eng St, must be on actual possession and not
presumption - so he can't prove possession in fact,
within 20 yrs, he must be ousted.

sure if no other person has been in possession during
 the time? For then there can have been no ouster of
 Plff's original right or entry. In such case it seems
 however if no person will be let in to disquiet.

In Court, a right of possession, is deemed equivalent
 to an actual possession, for there is no ouster of Plff
 in such a case during a vacancy of possession, and so
 his possession by right is not interrupted, as often happens
 in a case of Heir Lands, so that a right of possession
 is a satis ground on which to found a right action.

(Tresspass 5) There is no need of an actual or fictitious
 entry by Plff before action brot.

As a heir may have a right action, never in actual possession,
 without proving actual entry within 25 yrs - a term limited
 by Court to

If a owner bring a right action within 20 yrs after a ouster, 1. Saunders 313 B.
 and is nonsuited, it don't prevent Plff from running, 2. 432.
 To prevent a bar, there must be an actual entry within
 20 yrs before a action brot.

An undisturbed possession of 20 yrs in Eng, is not only
 a good defence to Ejectmt, but a satis ground on which
 to support it vs a real owner. 3. 482. 4. Burr 119. 7. 492 -
 The possessory title is then acquired by the occupant. 5. 421

It was resolved in 1774 that a peaceable possession for 3 yrs 2. 24 -
 by disseison entitled him to Ejectmt, vs a wrongdoer. 3. 21 -
 The Plff's claim being prior, and so preferable to a deft. 66

In Eng - possession for 20 yrs confers a possessory title 4. 447. 48 -
 only, it don't affect a actual right of property. 5. 61 -

386. 179.80-90-92. ^{owner} may be asserted after 20 yrs ~~after~~ in a real action.

As to Ruler, at y section of him, who has title. see 1. Burr.

1. Burr 50-68-
151.412-
11-
15
In Court a possession for 20 yrs. carries a complete absolute title - This I suppose is on y principle, if he who has y present title, has not entry. y possession in Law - When y legal possession is lost, y title is lost with it.

Exp. 2. + 31. 32-
4. Burr 2487-
Successive Masters continually for 15 yrs bar yeolmt. Aided in Court, for y Pth must have been possessed within 15 yrs, Bull 102. It is -

67.
Does y confer title on y last disseisor, so yt he can maintain y action? That cases in 1. Burr ante it does.

2. Burr, ex. 3. 2. under y 20, ^{multiple} an adverse possession - If not adverse, y do not run, for there is no ouster, or disseisin, and no presumption of abandonment by y owner. As one 1. Tenant or Tenant in Common is in sole possession for 20 yrs. It is no bar to y other. So if a 1. remain in possession, as 1. for 20 yrs, y 1. are ant. lamed -

But adverse possession by one Tenant in Common is "ouster enough". In 1. Burr.

1. ergo one 1. Tenant or Tenant in Common endeavours to hold y estate by possession, or rather y whole of it, he must prove an adverse possession of 20 yrs -
Burr, his possession in law is yt of his companion -
1. he deemed to hold possession as well for his companion, as for himself -
2. Burr 182-
Cov 218-
Burr 423-
2. Burr 182-
Estates in 1. Tenancy 13-12.27-

But what shall we deemed an adverse possession in such a case, is a proper to be left to y Jury. who may presume an Entry from great length of possession. 68-
Coup 217-
Esp D. 474-

If y party in possession claim under y party out, there is no title acquired by y possession, for it ant adverse, Bull. 103- of course y owner ant barred. As Tenant at Will or for yrs- remains in possession for 20 yrs- y Lessor is not bound. Some of y Court cases are vs all principle. Esp Dig. 435.
1. Root 68. 5/1. 222, 1801- 5 Day 1811.

So possession by a particular tenant don't run vs y remainder man or reverser. - for y possession of y former as tenant is not adverse. Besides y remainderman he has no right during y term - to take possession, ergo y he cant run vs him. Coup 218-

And when adverse possession is relied upon by Tenant at will, there shd be some proof of actual Entry, tho' presumptive Evi of y fact arising from circumstances, may go to y Jury. - As Tenant's declaring yt he holds under a stranger. Bull 104-
1. Roll 659-
Esp D. 435-

But it has been holden, yt a Tenant at will having taken a lease from a stranger, is no Evi of adverse possession, ni y latter has made an actual Entry.

Possession by a stranger under a claim of a right - 3. East 297-
is adverse.

If y action is founded on a clause in a lease giving y Lessor a right of reentry - for nonpayment of rent, & actual entry not necessary to maintain y action.

3^d Burr 189-
 Doug 460-
 1st Penn. 319-
 Note 1-
 Bull. 103-

Note for more needed, not to an entry, to oust y^e st
 of limitations, but to y^e entry (pro forma) or y^e
 purpose of making a title -
 Esp. S. 435. 451-

Conclusion of lease, entry, and ouster, is valid, tho' some
 former opinions seem to have been y^e other way.

1st 1185. Palk 259- And y^e last rule is general when an entry is
 Doug. 467- necessary to complete y^e title, & is not necessary
 1st Penn. 319. 287ⁿ to rebut title - It is derived from another, as for
 3^d Burr 1897- a remainder man to avoid a fine. Here actual entry
 Bull. 403- is necessary, in y^e former case y^e right accrues upon y^e act
 Esp. S. 4450. 456- event, or contingency, or y^e other upon entry.

1st Doug. 21- The person only who can maintain ^{y^e action,} as he who has y^e
 1st Esp. S. 435. 36- legal right of possession, Thus Mee may maintain y^e action
 1st Palk 245- either before or after y^e day of payment, not only so, but
 but y^e Mee's subsequent lessee also as well as as a stranger

The same rule holds in favour of Mee's assignee -

1st Doug. 23. 261- But if lands leased are post mortgaged, y^e Mee can't
 1st Esp. S. 435- evict y^e lessee, for ^{y^e} ~~his~~ title. But in Eng. a Mee
 1st 8th T. R. 2- has been allowed in such cases to proceed wth y^e lessee
 Mortgage 22- by writ, if he has given notice to y^e latter before action
 brought, y^t he did not intend to disturb his possession,
 but merely to secure his rent. This has been allowed
 as y^e coercive means of securing y^e rent -

Note. But it seems to me, wholly unnecessary for y^t purpose,
 for y^e Mee being legally entitled to rent, may enforce
 it, as any owner of it may -

So Mee may recover in ejectment, ^{mortgage} his y. money has been ²¹⁵ Pow. 214. 15-
paid, if it were not paid at y day, for he has y legal 1. Germ. 187-
title, his y equitable is in y mort. .. Equ 2323- 2. Do 1591-
Mortgage 61- 2 Day 151- 279-
1 Germ 187.

And as a General Rule, if y person has an y legal Estate,
(i.e. y legal possession title) shall recover in ejectment, Pow. 700 c.
his y equitable interest may be in another, or in y
himself - as Trustee or Lessee of a Trust, so if a covenant
to sell a house to B, and neglects to execute y contract
B tho' in ^{possession} ~~possession~~ under y contract, is liable to execution EJECTMENT
at Law. 7 TR. 347. 663- 7. East 23. Ch Rds 5, 112-
2 TR. 61. 8 Do. 516- Corp 473. 5, 9- Doug- 22- 005- 747- 1. R. R. 334. 447-
Ch Bills 5- 112.

And in some Modern cases, Cts of Law have somewhat
relaxed, & taken notice of Trusts & equitable rights, under
special circumstances. The principle of these questions has
however been questioned.

By Ejector

When y Plff must recover by y strength of his own title -
not y weakness of y Def's. - because a recovery may be defeated
by joining title in 3d persons.

But y can't be done where y Pl's title is derived from
y Def, or where y Def holds under a title derived from y Pl's.
In both cases, a rule analogous to y doctrine in Estates Tail,
applies - as there is there. The vs his own Lease past y
expiration of y lease - in y former case, y Mort. and in y latter
y Lessee can't have title in a third person -

Upon y same principles if B claiming under a lease to
C, in ejectment by A vs C past his lease is determined,
y latter can't dispute title -

For 70-

Esp 2. 436-

Super on Legacy

190-191-

The devisee for a term of yrs, may maintain Ejectmt, but not in Eng, till y executor has assented to it, (The legal title being in y executor)

ie, Executors assent necessary in Court?

Seems not clearly, since actions for legacies ^{are} always supported in a Ct of Law. in y State. Tho if y legacy is not specific, declaration is first necessary -

Co Litt 240. b.

Prov. 2. 180-93-

Esp 2. 437-

73-

But when a Freehold is devised, ^{at} devisee may recover immediately on y testator's death - no assent from any one is necessary - The Ex^{or} has no concern with it, and y heir's title is ~~good~~ ^{gone} - The devisee has immediately y legal title - on y Testator's death.

Esp. D. 437-

2. Day 76-

The Assignees of a bankrupt may maintain y action for lands wh belonged to him - for y title is vested in ym by y St of Bankruptcy -

74-

y Committee of a Lunatic can't maintain ejectmt for lands wh belong to him. It shd be in y Lunatic's name for title is his - and y Committee can't make y necessary demise, being only a bailif or agent -

Hobart 213 y

Rulton 16-

2. Wils 130. 31-

Esp 2. 438-

The lease is made of a Lunatic's land by his Committee under an order of Chy -

In some cases, y action must be in y name of y Lunatic, suing by his Conservator - as an infant by his Guardian -

4 Co 95. a.

2. Ben. 20-

3. Wils. 13-

Exp 2. 439-

An Executor may have y action, either for y trustee of his testator, or himself, when y lessee or testator was a lessee for yrs. It being a chattel interest -

To of an Administrator
If one is disseised of an estate of inheritance and dies, y
remedy belongs to y heir -

But he can't derive his title from an ancestor, who was
never seised -

In Comt y heir may support y action, tho y ancestor was
never seised - The maxim "Seisena facit stipitem"
isn't adopted there -

An alien can't in general maintain y action, for he
can't in general hold lands -

Its in some of y U. S. varying y rule vide Encyclopaedia
Alien - Devises 67. Sec 14 -

Secus when naturalized by y laws of y U. S. or its Laws -

4 Sts. vol 7. 136-4. 133 -

An Alien being a Tenant in a house, may at 6 Law, 4. Sts. 300
maintain Ejectmt for it. This is allowed, or y 2 Sts. 249-
encouragement of Trade. 274-
7. Co 16. Co Lit 3-8-129-

A Lessee for yrs. may maintain vs y Lessor y former
having y right or rather y present right of enjoyment

Pleadings

The declaration shd state y Plffs title as it is, and shd
show a substantial title at y time of y action brot, If he has
not title at y time, he has regularly no right of recovery
i.e. for y true time

27.

But it isn't necessary in y Eng practice, to state y Plffs
entry on a day certain - Its wates to set out his title, i.e. y
lease, and y't he post entered, for so are y Precedents -

Ep D. 445-
3 Sts. appx
729-

Besides y entry isn't traversable - The Def must confess, lease, entry, and title
lease, entry and ouster

1. Selwyn 7. The Ouster shd be laid subsequent to y P's title,
Bull. & P. 106.
Cro. 3. 96. Secus y declaration shows no cause of action -

Cro. 3. 311. The particular day of y Ouster, it is said, need not be proved
Esp. d. 445-46. or rather stated, i.e., no particular day need be stated.
It is satis, if y Ouster appears in y declaration, to have
happened post y P's title assumed & before writ was
brought. But it is usual to alledge a day certain -

78. There is y Issue fatal on Special Demurer? It is y
declaration good on y ground of y facts being not traversable.
The Ouster being confessed under y Count - rule.

2. La Ray The land or subject sued for, must be described in y
1470.
Cro. Elvi declaration, at y Sheriff may know of what he may
399- or is to deliver, possession on, y writ Habere facias
Cro. Ch. 471. possessionem - Secus y declaration is ill -
Falk 284.
5 Burr 2673.
3 Wils 23 -

Great precision was anciently necessary - but a rule is now
greatly relaxed -

Crow. 3. 350. For y Lesson of y P's is to show y land to y Sheriff at his
Esp. Dig 448-
1. Burr 629. peril - Str. 71- 1063.

In Eng y boundaries are usually given, but y Parish in wh
3 Wils 23. it lies, y kind of land, as arable, or Meadow - and y quantity -
7. J.R. 333-
335- 12. some certain quantity is required to be designated -
32 R.C. R. (the town, y land's boundaries - y quantity - in Comt.)
706-
Bull. & P. 109 - - Esp. d. 446. 47-
1. Falk 254
Str. 595- If there is mistake in y Parish, y P'ty can't maintain y action
2. R.C. R. 706-
2. East 497. 99- (Example for y Parish is part of y description, of y subject
501-502- matter and not laid as a mere venue -
Esp. Dig 459.

79. But y P'ty are bound to declare for y exact quantity,
if he is entitled to recover - He may sue for such a
quantity and recover so much of it, as he proves title to -

For a mistake of quantity is no variance - vide Pleadings
6. Laws ^{at} Pleadings 49 - Cro 13. 3. Per. 334. Cowp 260 -

But he can recover no more yn he declares for, tho'
he may recover less - 1. Burr 326. Esp D. 447.

So if he declares for a longer term, yn he has, he 80-
may declare for such a term, as he has. For y question, is, Bull N.B. 106
an he has y possessory right to yt sued for - Esp D. 447. 448 -
recover ante P. 7 - Post 83 -

Tho y Def in Eng confessed lease - entry and ouster - 1. Mills 220 -
he may still deny, yt he is in possession - If y Plff Bull 10 -
cant prove it, or rather if he cant prove y Def's possession 7. PR. 327 -
was in Def at y time of y action, (brot) he must be 1. Best at Pull
non-suited - 573 -

The General Issue in y action of Disseisin, is "No
Wrong - No Disseisin" In Ejectmt, not guilty - 3 Bl. 305. appx.
8-10 -

Special Pleas in bar are very unusual in y action of Ejectmt, Indeed y common rule in y Eng practice, Bag At
requires y Def to plead y General Issue - 2 Salm. 156. Page 2 -
York 180 -

3 Bl. appx. 8. 9. - Rummington 190, 238. Cro Ch 261 -

But such Pleas are sometimes allowed. Semble -

Evidence -

The Plff must in general recover by y strength of his
own title, not by y weakness of y Def's. This is a good defence 480 682 -
under y General Issue, to prove title in a stranger. 4. Burr. 2484. 2. PR. 749 -
2. Day 227 - ante 72 - Esp Dig 455. 455 -

But y title proved in a 3^d person must be a good and
subsisting title. or it is no good defence -

402.
Rule N.P. 110.
Est. Dig. 456.57.

as def produces an old lease to a stranger, This
ant satis ni he prove possession under it, within
20 yrs - a supposed title ant satis -

When a lease from Pltff to Def is void or voidable,
possession may be recovered vs Lessee by y Lessor in
yo action - But y Pltff may destroy his right of recovery
by some act affirming y lease, or waiving his right -

The rule is. If y lease is void, no act of y Pltff can
affirm - As Lease by Tenue Coven, no subsequent act
necessary to set it aside or re-vest her title -
The title continues hers, and y lessee may be sued
immediately.

So if a Tenant in life alien in fee, it is void -
Hence y acceptance of rent by y remainder man don't
set it up -

But if y lease is only voidable, there may be an
implied confirmation of it by y act of y Lessor, or y Pltff -
As lease on condition, yt if y lessee assign without lessors
consent, y latter may re-enter - This is only voidable -
not ipso facto void, for y terms of y condition only
enable y lessee to avoid. Hence acceptance of rent
by y heir of y lessor, after notice of forfeiture, is a confirmation
of y assignmt, and a waiver of y condition -

If y Pltff sets out y abuttals of his close, he must prove
ym as substantially as laid - But if an abuttal, is laid
East, proof yt is NE is satis -

Ante 63.

The St of limitations is a good defence under y Gen Issue.

40.

Verdict. Judgment. &c.

The Plff in y^e action may recover what y^e title or interest
wh^{ch} he proves, tho' different from y^e laid in y^e declaration.
as when having title for 5 yrs only he declares for seven

So if he declares for a certain number of acres and proves
title to a less number only he shall recover y^e latter -
ante 79-

So if he declares for several things, as for a house, and
barn) he may recover on one and not on y^e other. Crs Plur 186.
and tho' y^e declaration may be ill as to one, it may be good and judgment may be awarded for y^e other -
Esp Dig 120 -
P. 84 -

If y^e Plff declares for land only, he will recover with 84 -
it all y^e buildings upon it - They being included in
y^e word "land" - Co Litt 4 - Ek. Dig 491 - Dyer 47. a - 2: Pl. 17/18,

If y^e Plff recover judgment he has a writ of Habeas
Faciās possessionem under wh^{ch} y^e sheriff puts him in 1 Att. 258 -
y^e possession and turns all others out - Esp D. 492 -

In y^e execution of y^e writ, y^e Sheriff may break y^e outer doors 5 Co 81. B -
of y^e dwelling house, if necessary. For y^e writ can't be 2 Bac. Exec. 179 -
be executed, if admittance be denied him - wh^{ch} he can't
do in executing any other civil process - Sheriff 11 -

T. In Cl. R. 22 -

- 852

In Count y^e Plff having taken possession pending
y^e Suit, don't prevent his recovery - He may still 1. Root 72
have damages for Judgment for damages and Costs -

Yelv. 180- In Eng. it may be pleaded in bar, but post issue
 Ep 2. 454- joined, it is discretionary with y Judges to admit
 y Plea or not -

So if y term for wh y action is brot, expires, pending
 y Suit, y Plff has judgmt for damages and costs - for
 7. P.B. 325 y trespass remains - but he can't recover possession -
 Sta 1056.
 Co Litt 285.
 Ep 2. 492. 3 mod 249. Runnington 404-

by y Sheriff,
 If post y Plff is put in possession, y Def turn him out,
 1. Feb 779- y former may have a writ, "habeas facias possessionis"
 Bac abt. Exec. or attachment vs him for contempt - Secus of execution
 G. 2. by a Stranger -

It has olim holden, yt a new trial shd not be granted
 in any case of Execmt - Talk. 648. 650. La Ray. 514-

In y Eng. action of Execmt, if y verdict is for y Def,
 4. Burr 2224. y It will seldom, if ever grant a new trial - For as
 For 1166- Plff may bring a 2^d action, there is no necessity for
 Ep 2. 493. a new trial -

The Judgmt in y first action, is no bar for by y fiction
 on wh y action is founded, a new casual execut
 as well as a new lease and ouster may be laid
 in each successive declaration -
 Eri 49. 52. Pow. Chy. 47-

4. Burr 2224- But if y verdict is for y Plff, a new trial may
 easily be obtained, as in y other actions to prevent
 y change of possession, and possibly y Defs. possession
 may be his only title - In wh case his bringing
 a new action, might be of no avail to restore

him to y possession. Tho' y Plt shd ultimately be found
to have no title -

The Recovery of Mesne Profits -

The verdict in Exctmt, when in Plt's favour, having
established his title, it follows at once y time of y Plt's,
yt Def. has been a trespasser -
Trespass 7 -

For y Plt having acquired possession, & possession
has relation to y time of y title's arising, and yt gives
him a right of action for y intermediate profits -
Trespass 7 -

After a recovery in Exctmt ergo, y Plt may have
an action of Trespass vs y Def, to recover damages
for y latter's unjust possession -

This is called Trespass on Mesne Profits -

The damages recovered are in General y value of y hie 3 Wils 121 -
of y land during y Def's possession - Cro Eliz 182. Fulk 638 -
Esp D. 484 - Bac Abr. G. H - 3 Bb. 205 -

It may be laid with a "continuando" wh supposes Gen -
y Plt to have been in y continue possession during
y time of y ouster, or y ouster and y whole case may be Special -
stated Specially - Trespass. 7-40. 2d Ray. 377 - Ple App. 502 -

This action ^{for mesne profits} is incident to a recovery in Exctmt - 3 Wils 121.

It is said y Plt may, if he chose, bring a bill in 88 -
Ch for y amount of y profits - But yt isn't usual -
Bac. Abr. Ecc. H. 1. Bern 105 -

The necessity of y action arises from y circumstance, yt
in exctmt y damages are nominal - 3 Bb. 205 - 3 Wils 117 - 1 Wils -

Case 205.

But it has been held, y^e Plt^f may recover his actual damages in Ejectmt - Bac Abr. Eje. H.

But ^{the} rule appears secus ante 79 - For excepting, at y^e time of y^e Def's wrongful entry, y^e Plt^f has been out of possession, and is so at y^e time of obtaining his verdict in y^e Ejectmt. Antecedent full damages were recovered (ante 59) But y^e must have been post actual reentr^y, before bringing y^e Suit - ante 7-8. (Contra 59) Trespass 7-9.

It seems y^t y^e whole damages can't ^{be} recovered in ejectmt, because y^e action ant^y laid with a "continuando"

And if by laying it with a "continuando" y^e Plt^f might recover y^e whole damages, he wd be obliged to prove an actual Entr^y - Trespass 7-40 - ~ 7-40.

6. Mod. 222. In y^e second action, it ant^y necessary for Plt^f to prove by witnesses y^e wrongful entry of y^e Def - y^e recovery in Ejectmt is conclusive of y^e fact - in his proof.

Bul N.P. 87-
3 Bul. 205-
Esp. S. 404-
Bac Abr
Ejectmt. H-

The Plt^f however ant^y confined to y^e time of y^e lease, and as far as laid in y^e declaration in ejectmt. He may recover antecedent profits, if he can prove antecedent title and antecedent possession of y^e L^{and} - by

Bul N.P. 86-
Ibid

3 Nils 121-
Esp. S. 494-

But y^e distinction must be noted - If he sue only for y^e profits accrued since y^e lease laid in y^e declaration in Ejectmt - The record is in y^e action conclusive in his favour - But if he go for antecedent profits, y^e L^{and} may be in controversy his title, or any other fact in y^e declaration - The Record don't prove it -

In y former case, over & y judgment in ejectmt,
of y execution of title & possession is satis'd. satis
proof of his right to recover for y profits accrued
under y devise.

So is a Prior Ejector, y record is no Evi. It is 1 Pels 239.
"Res inter alios acta" The Pl^t must prove his
title - Est Dig 494. Th

This action however is within y Purview of y St. Bull 88
of limitations, as to Trespasse. The def^y may urge Est. 495.
protect himself as to all y Meane profits - in what
have accrued within 6. y^s in Eng and 3 in Connt.

In England, y action may be brought either in y name
of y Nominal Pl^t or of y Lessor of y Pl^t. 1. Burr 665. Bull 89-
3 Pl^t 205.

And if y nominal Pl^t release y action, y action
being in his name) he is guilty of contempt. Salt. 261-
Bac abt. 1
Eject H.

Questⁿ Mont y Lt forbid y Def^y to plead it y release.
Pl^t.

Tho' in common cases, one Tenant in Common, cannot
maintain Trespasse vs his companion, yet post a recovery
in ejectmt he may have y action, it being incident
to y former. But post recovery in Ejectmt, he may have
y action for Meane Profits. Estates in Lev - 3 Mils 118
28 Page - Est Dig 495-
Litt R. 329.

Finis of Ejectment.

Waste

What amounts to Waste and what
 not? 412 In houses - 412 In Lands
 414. In Trees 415. Rules applying
 to Waste in General 414 Who
 may maintain the Action 418
 Against whom the Action lies - 421.
 Recovery in the Action - 424-

Waste

412.

Waste is any spoil or destruction in houses, lands, trees or other corporeal hereditaments - to y^e disinherison of y^e heir who has y^e remainder or reversion in fee simple or fee tail -
 is tending to diminish. Co Litt 53 - Bac Abr. 2. Pl. 281- 3 Pl. 223- Bac Abr. M. Introduction.

There seems olim to have been a distinction between Waste and destruction, wh^{ch} isn't attended to now -

Waste is of two kinds, "voluntary" and "Permissive" Voluntary is y^e wh^{ch} is caused by positive acts of spoil or destruction. It is an offence of commission - Permissive is y^e wh^{ch} happens thro' negligence and is an offence of omission -

What amounts to Waste. and what not?

In general what works a lasting injury to y^e inheritance, is Waste - destruction intra - it can be done only during an Estate for life or yrs -

1st. In houses or buildings, Demolishing or burning a house, is voluntary - Co Litt 3. a. Com D. N. D. 2 - 2. Pl. 374- 2 Pl. 281- Bac Abr N. C. 5. 4. Co 64-

So removing boards, timber, floors - or any thing fixed to y^e freehold of a house, is waste - as a door, window, shelf or hearth - &c. It is voluntary waste -

The removal of things by y^e Lessee of things annexed to y^e freehold, by himself is waste - as Rainscot - for it is parcel of y^e building - Co Litt 53. a. 4 Co. 64- Bac Abr. N. C. 5-

Tho' in gen nothing is waste, w^h what works an injury to y^e freehold, yet changing y^e situation and use of a building by y^e Lessee, tho' advantageous to y^e Lessor,

413
Cro. J. 182. In converting a Corn Mill into a Milling Mill,
2. Roll 114- tho' y value is thus increased - Is converting a Brewhouse
Bac. M.C. - to some other use, tho' more profitable -
1. L. 309. 11-
2. Roll 282-
Com. D. waste. B. 2.

~~Supposing~~ ^{Suffering} a house to decay for want of necessary repairs,
Co. Litt 53. a. it is permissive waste in y Tenant - For he is bound
Bac. M. C. 2- at his Peril to keep y house from wasting, in exempted
2. Roll 815- by contract -

Com. D. M. D. 2- Secus if y Lessee has cut all y timber since ^{lease-} ~~time~~
Bac. Ab. M. E-

Rob. 234- Building a new house on land demised, where there was
2. Roll 815- none before, is not waste - Bac. Ab. M. C. 5-

Co. Litt 53. a Contra -

Rob. 234- But y Lessee may not take y Lessors timber or other materials
Bac. Ab. M. E. to build or repair it - It must be altogether at his own
charge - cutting timber wd be waste

But if y Lessee having built a new house "ut Supra"
suffers it to decay, he is guilty of waste. For it becomes
part of y Freehold - Rob. 284. Com. D. M. d. 2-

Co. Litt 53. a -

Rob. 234- If y Lessor built a new house after y demise, y Lessee
is not bound to keep it in repair, & is not liable in waste
for its decay - For it is not part of y thing demised.

Page 5.

Co. Litt 53. a If a house was uncovered at y commencement of y lease,
Bac. Ab. M. C. 5.
Com. D. M. B. 2- its decay for want of covering, is not waste in y Lessee,

2. Roll 281- Altho' y burning of a house thro' negligence or accident,
Bac. M. 2. 5- was waste in y Tenant, He is now excused in Eng in case
of accidental burning by y 6. 1st of Ann

44

The destruction of a house by y act of God, (as by lightning or by public enemies) ant waste in y Tenant -

-16-

Comyns Dig M. 3. 5-

Bac Abr. M. C. 22-

But if y house in y last case be bert standing and capable of repairs, y Tenant must repair it in a reasonable time. Secus if it suffer other lasting injury, it is waste -

Comyns D. M. E. S. Co Litt 53. a. 10 Co 139. Bac Abr. M. 3. E

If y Tenant commit or suffer waste in houses, yet if he repairs ym before action bro't, no recovery can be had vs him - But he may not take y Lessors timber to repair after actually suffering waste - Temple - Ibid -

2d In Land Digging up and carrying away y soil is waste -

To in superseding a wall to be ruinous, in consequence of mth Com. D. M. 24 - y land is injured by y influx of water - 2 Roll 816. Co Litt 53. b. - Bac M. C. 1 -

Co Litt 53. a. Com. D. M. E. S. Comyns Dig d or b. 4 - Bac M. C. 1 -

All bad husbandry ant waste. As if tenant suffers arable land to be overgrown with ~~waste~~ thorn thrd neglect it ant waste - Bac. M. C. 1 - 2 Roll 814 -

But generally converting one species of land into another, is waste, as arable into Woodland and E converso - 2 Roll. 282 - meadow into arable and E converso, For it changes not Col. 234 - not only course of husbandry but y ^{here} ~~tenor~~ of y Tenants - Co Litt 53. 8 - y Estate - Com Dig. M. 2. 4 - But No change is waste ni it is detrimental - 2. Roll 814. 15 -

If tenant for life opens new mines on y land, he is guilty - 8 - of Waste, ni y lands themselves were demised - he takes y land to cultivate -

But digging in mines opened at y time of y demise, is not waste. tho' y lease don't mention mines - Co Litt 53. B.

5 Co 12 - 2 Mod 193 - Bac. Abr. M. C. 3 -

Roll. 234 - 2 Roll. 282 -

Third In Trees— If tenant for life &c cut down
timber trees, (ni in Special cases) infra he is guilty
of waste, timber being part of y inheritance—

as if he do any act in consequence of wh y timber decays—
as topping or tapping—

It if destroyed thro his negligence—

By timber trees, are meant those fit to be used in
building, as all trees are not timber—

Cutting down shade trees, & having house tho not timber,
is waste— This called by & Coke a destruction—

Co C. 531.

as to what particular trees called within y description—
see 2 Co. 281— & 65— a Coke Litt 53^a 2 Roll 817— C 12—
S. B. 459— Oak, Ash and Elm after y age of 2 yrs are
timber in Eng through y realm— and where these
are scarce other are usual by custom— Com J. D. 5.

But what trees are in other countries to be considered, timber,
must doubtless depend upon y usage of each country, and y
must be regulated by y species of Trees fit for building, wh
y country produces—

In Connt. Pine, Oak, Cedar, Chestnut, Locust &c must
be regarded timber—

8 T R 146.

Under ^{Co. 2. 3} Tenant. may cut at pleasure, if it be at y proper
season— 2 Co. 281. 32. 2 Roll 817. 459—

-10-

Co Litt 41.
Bac Ab M. B. 2.
Co Eli 604.

A tenant is entitled as of common right, ni restrained
by express covenant, to such wood growing on y land,
as is necessary for fuel, for repairing houses, & fences—
and making and repairing implements of husbandry

411

Bac Mm. F

Com. Dig. W. D. 5. Co Lit 53. B-

2. Role 822-

Mr. D. S.
Comm Dig. Mr. D. S.
Mr. D. S.

C. Lit 54.3.

So tho' y house were ruinious, when y heard entered—

Ibid 2. Roll 822. 823-

Bac. M. C. 4-

2. Roll 817-
Co Litt 53, a -
Com 2. N. 6
D. 3-

was not Guilty of Waste - But y Sub. Ct as a Ct of

Bae. N. F.

Com Dig. 2. n. 5.
2 n. 5-

92. 57 - 57. 57. 2

Aliter tis a Covert only.

If a Tenant in Tail lease with impeachment, ~~and~~ cause 16.
will bind his issue, this they shd conform y lease by acceptance Com. D. M. E. 3.
rent, for it wd operate to y disclaimer of y Right in Tail 1. Roll 183-
Com. D. M. E.

Tenant ant guilty of waste, if y injury is caused direct
or indirectly by y Tenant, as if he destroy a line in consequence
of wh trees are destroyed.

So if y Tenant cut y timber, not leaving enough for repairs, Com. D. M. E. 4
and y buildings decay for want of repairs - y Tenant ant
liable for want of repairs. 2. Roll 822-

So if y Injury was occasioned by y act of God or y King's
enemies - And in y case he must repair in convenient time, 10. Co 139. B-
Com. D. M. E. 5.
if y subject matter ~~of~~ remain and be capable of repair. Co Litt 53. a.

Who may maintain y action

The old & Law writ of prohibition to restrain waste -
is taken away by y Stat. Westm. 2^d.

Waste being to y disherison of y party injured, y action Rec. M. G.
must be brot by him, who has y immediate reversion of inheritance
in Fee simple or Fee tail. Hutton 110- Co Litt 53. B. 285. a. 3 Roll 227.
Com. D. M. E. 2. 2. Roll 825-

The reversion or remainder in y Plff must be immediate 18.
there must be no intervening Freehold remainder. If there be, Rec. M. G.
y reversioner or remainderman cant maintain, for if he cd 5 Co 77-
y recovery wd destroy y intermediate ^{estate} as Lease to A for life, Com. D. M. E. 3-
remainder to B for life, remainder to C in fee. Here Co Litt 54. a-
if C cd recover as a during B's life, C entry for y 2 Bl 167-
forfeiture wd divest B's remainder, it being Freehold -

But if y intermediate remainder in B, in y last case 2 Bl 166

Com D N.C. 3. were for yrs only. C might maintain y action as a during B's life - For B's remainder being a chattel interest does not require y continuance of y first particular estate to support it 2. 36/106, but may take effect after C's entry on C's death - determining y injury made to A and not destroy B's term for yrs -

If after commencement of y lease or life, y reversioner grant y reversion for yrs to another, ye ant a remainder, and y reversioner can't have y action of waste during y second term -

If an intermediate remainder for life is limited on a precedent contingency, y reversioner &c in fee &c may maintain y action - For here y recovery, does not divest y remainder, but prevents it from vesting, as limitation to A for life. Remainder to B for life, if he shall attain y age of 21 - remainder to C in fee -

¶ 22 or So if y or a lease for life or yrs is made to A for y life of B, y reversioner &c may have y action during y first limitation - for both estates are in A and he is y wrongdoer -

2. Rde 829
Com D N.C. 2.
Co Lit 54. a
3. Co 76

It is satis, if y Pltff has y immediate inheritance at y time of y action but, tho he had not at y time of y waste committed - as lease to A for life and remainder to B for life - A committed waste, post B dies or surrenders - The reversioner may have y action vs A, for B can't now be injured by a recovery

If a tenant in Com. in fee &c lease his part to his cotenant for life or yrs, he may have y action and

recover a moiety of y^e price and damages. Com D. M. C. 2.

By y^e 1st. 2^d one tenant in common y^e inheritance may have y^e action as his fellow for waste committed on y^e estate, tho' no lease "ut supra" The Equity of y^e 2^d extends to Jt Tenants, not to coparceners, for they might compel partition at Law. 3 Bl 227- 2. Do 183-

In R. F. it lies vs. Coparceners. Jt Tenants & Common

He who has y^e inheritance, may join in y^e action, one who has a small^{er} interest, as his wife when y^e remainder is to y^e son and y^e heirs of y^e husband. So if y^e reversion is in A and B and y^e heirs of B. The wife may join in first case - A in y^e second - Secus y^e recovery and give a life seisin to y^e husband. Co Litt 42. a 33 B. Com D. M. C. 2. 2. Roll 825.

By y^e 2^d for y^e commit waste and no term when y^e - 21- fore action bro't. yet y^e lessor may have an action of waste for y^e damages (Wemble) tho' he can't recover y^e place wasted, for y^e is already out of him. Bac. M. G. 5. Co 119. Cro J. 658- Co Litt 283. a Do 85. a

The OPLH can't maintain y^e action, ni he has y^e same estate continuing in him; wh he had when y^e waste was committed. As Reversioner in fee, after waste committed, grants y^e reversion to another and then takes back y^e same estate - the action is gone, for his right of action was divested by y^e Grant. So Purchasing don't revent it. The ^{priority} of estate is destroyed.

At Law y^e Grantee of a reversion in fee he can not maintain y^e action, y^e noncommission of waste being a condition to wh he is neither party. or privy. By 32. Hen 8th he may after notice of y^e Grant. Cro J. 145. 2. Bl. 156. 3 Do 109- Co Litt 215-

421- Against whom? y action lies.

2. Bl. 282.3. At E Law waste lay vs guardian in chivalry, tenant in
3. Do 224-
Com. D. M.C. 4, dower. tenant vs y Curtesy only
Co. Lit 34. a-
Bac. at M. L.

As to Tenants by y Curtesy opinions are contradictory but
by y the better opinions, he was liable.

Com D. M.C. 1.4-
5 Co 13.
2 Bl. 283-
Bac. M. L.

But a Lessee for life or yrs was not - Semb -

Contra 1. Reeve His of E Law 386. 2: Do 90-

A tenant by y Curtesy is held liable in Court.

2. Bl 283-
Bac Abr.
M. L.

The reason of y diversity at E Law between Guardians, and se-
nors and Lessees for life - so was yt y estate of y former being
created by law. y law gives yd remedy vs him.

But as y estates of y latter were created by y owners of y
inheritance, he might have provided vs waste -

But by y St of Marlbridge (52. Hen III) § Gloucester (1
Edw. 1) yd action is extended vs all tenants for life or
yrs - - so hini yt held by y law of Eng or secus for term
- life or for term of yrs -

- . 2d 6.

Note y action is founded on privity of estate between y parties,
viz between y reversioner and remainderman of y particular
tenant.

It lies ergo vs devisee for life or yrs since these Sts -

So vs y assignee of a Lessee for life or yrs, for waste done
after y assignment

The action in yd case (when y waste is done by y assignee)
can't be supported vs y original tenant for life or yrs.

For first, tis a general Rule. yd y action must be vs him
who committed (or thro his negligence suffered) y waste -

Besides. Second, y privity of estate is gone as between Lessor
privity

and Lessee -

But if y Tenant in Dower or by y curtesy ^{assigns} ~~assigns~~ ^{assigns} waste, action vs y heirs is Tenant in Dower &c For they are liable for waste by y & Law.

But as no action of waste at & Law lay vs y assignee, it lay of necessity vs ym, tho't they had assigned bys liability at & Law isn't removed by y &c. ~~Supra~~ -

Com D.C. 74 - or 704 -

Bac Abr. W. R.

But if Tenant by y Curtesy ^{assigns his estate} and y assignee commit waste Same of and y heir grant away his reversion, y Grantor of y reversion Tenant can sue y assignee in waste of him only, for there is a ^{priority} in Dower of estate between ym - But y Tenant by y curtesy as such can hold of none but y heir, here is no priority of estate between him and y Grantee of y heir - Co Litt 54. a. 316. a -

Purkbert 56.

3 Co 23. B. Bac Abr. W. R.

This action lies vs an occupant, common or special for he is Tenant for life -

Co Dig. W. C. 4 -

3 Mod 93 -
Co Litt 54. a -

So vs an Ex or adm. ^{for} who takes a term ^{for yrs} as assets and vs an Exce. "de son Tort" for waste committed by themselves, they are in effect, assignees of y term

3
Comy D. W. C. 4 -
3 Mod 93 -

If y tenant for life ^{or yrs} commit waste & then assign, he remains liable, y right of action is complete before assignment 2. Roll 820 -

Com. D. W. C. 4 -

If waste is committed by a stranger, on land in possession of lessee for life or for yrs, y lessee is liable in y action on y ground of negligence in not preventing it. So of a Tenant in Dower - or by y Curtesy of y tenant &c he has trespass vs y stranger - This holds on y estate is conventional, or legal -

Purkbert. 60 -
Bac. Abr. W. R.
Com. D. W. C. 4 -
2. Roll 821 -

3 Ser 209 -

For y wrongdoer being a stranger, can't be guilty of waste & y assor &c can't sue in Trespass, not having possession -

But he may sue in Case, it seems - 12. being Spec. action in y case - Quere
Bac. Abr. 10 P. C. 3 -

Bae. W. H. The same rule holds, tho' y Tenant be an infant,
Com. D. W. C. 4- or same Court - c - - - of 1 - - - y?

Idem So if ^a ~~lessee~~ stranger dispossess y lessee and then commit
2. Rule 821. waste - y tenant is liable for y^t waste.

P. 26- If a tenant for life having committed waste, dies, his
2. Rule 828- Ex or adm is not liable to y action - So of a Tenant
Ex Offici in Dower or by y Curtesy - it being one of those tolls
of Exec. 127- wh dies with y wrongdoer - Com D. W. C. 5.

Com. D. W. C. 5. So of Lessee for yrs - tho' y term goes to y Ex or
adm -

2 Bl. 25 283- It has not as a tenant in tail after possibility of issue
Co. Lit. 27. 54- entered, for his estate being in its creation an inheritance
Com. D. W. C. 5- is not within y St, wh gives y action by y lessee, ~~the~~
2. Rule 826- 828- may however be restrained from excessive waste by
injunction in Chy or Equity -

Com. D. W. C. 5- For does it lie on a lessee at will for y commission of
5 Co. 13. B- waste "ipso facto" determining y estate & makes him a
Ex Offici 777- stranger - Besides he aint within y St, being neither
784- a Tenant for life or yrs -
2. Bl. 146- :

where at y day aint he now quasi Tenant at will?
for yrs. vide "Estates at will"

nor is a Tenant for life &c with impeachment for waste
He is exempted by y deed wh must contain y lease -

2. Bl. 283- nor is his lessee for yrs, for y exemption extends
2. Rule 838- to him by following y estate -
Com. D. W. C. 5.

Recovery in the action.

The punishment or rather redress for waste at C. Law. 2. Bl. 283-
by y. St. of Marlbridge. 52. Hen 8th was only single
damages. (In R. & I. double) 7 1 gr. or

But now by St. Gloucester (to Edw. 1) y. tenant suffers 2 Bl. 283-
treble damages in y. place in wh. y. waste is committed. Com. D. N. F. 2.
Bac. M. N. M.

These being ancient Ls are "prima facie" law of
ys country, or at least of what were original Eng. Colonies -

At C. L. y. was not a mixed action -

Since y. St. y. action is a mixed action in Eng, 3 Bl. 228-
both really, and Personally being recovered. 117/18-

If y. land demised be 3 acres and waste is committed
on one only, only one is recovered -

Only y. particular parts on wh. waste is committed, are
recovered, if they are easily separated from y. others -
as a particular Close or a particular part of it -

Secus if committed sparsim in a wood, or field - 2. Bl. 284 -
Bac. M. N. M.

If committed in several rooms of a house, y. whole is
recovered by Plt. -

Secus if in one room, wh. is easily separated from y.
rest - Co. Litt. 54. 2. Bl. 284 -

In ys State, single damages are only demanded - and erg
no more were recovered - The same Tenants are liable
here as in Eng - but they never recover y. place
wasted, but y. St. of Gloucester is y. law of ys wth
doubt -

Title Lower. St. of Count -

1881

1882

1883

1884

425102
/.

430

430

Towers of Chancery-

Powers of Chancery-

Ld. Rames description 433 Blackstones
Distinction; 437. Power. Final and Relief
A power to relieve vs Penalties. - A power
to enforce Trusts - To enforce justice when
positive Law is silent - To abate the
nuisance and supply the defect of the Law

Rule

The Subjectmatter or Parties to be found
must be within the Jurisdiction of the Ct

444. Marriage Settlement Agreements

445. General Rule. There must be
damages at Law. 447. General Rule

The agreement must relate to the Realty
General Rule. He who asks specific relief,
must show in his Bill, that he is ready
to perform his part 452 Exception

454. Equity considers an agreement as
executed from the time it was made.

456. Hence liability of Vendor &c.

Relief vs Penalties 461. Setting
aside agreements 464. Power of (Ch)
to issue Injunctions 471. Chancery will
set aside agreements obtained by
imposed hardships - & oppression.

FINIS

Power of Equity

The power of equity is not confined to the
 following description given by Lord Eldon, the
 powers are first -

First. A power to abate y rigour of Law.

Second. A power to determine kata y spirit and
 not y letter of Law.

Third. A peculiar jurisdiction over matters of fraud,
 accident and Trust.

Fourth. That they are not bound by rules and
 Precedent. This description will be found to
 be very erroneous. 3 Bl. 429. Midford's Pleading 5. 5.

First. As to y first then, is a power to abate y
 rigour of y Law. Such a power has never
 exercised or claimed by y Cts of Equity

It was a hard case ~~also~~ formerly, before Sir 3 and 4.
 11m and Mary. y bond creditors, whose debtors devised
 away y real estate, so that their creditors might be
 defrauded of their debts - Rigorous and unjust rule,
 rule, with just Severance in better condition y hear,
 and yet a Ct of Eq had no power to interfere
 That would exclude from imputation - Can't exchange
 agreements this hard

3 Bl 430 -
 2. Bl 243.4.
 377.8
 238 -
 435 -

2 atts 239 -

Second. To determine kata y spirit and not y letter of
 Law, for rules of construction common to both -

Don 204 -
 1. 3d Com. 61 -
 3 Bl 431. 34. 36 -

See -

Municipal Law. 23 -

434.

435

Third. Fraud. Accident and Trust, but fraud of
perhaps every kind is in some way or other cognisable
in Cts of Law, sometimes exclusively, ^{when} in others it
devise -

Pow 2.69-

1. 247m 348-

3 Ams

177.544-

For many accidents also, as loss of deed, mistake in
account - Contingencies not rendered, & performance
of a condition impossible

5 Co 74.5.

3 Ld 57.
151.

Some not relievable in Equity. As devise ill executed,
contingent remainder destroyed

Trusts. It is true are gen cognisable in Cts of Equity 3 Bl 431.2-
only - but not always - As Boulton's, money had and
received to another's use -

439-

Will y action on y case ever lie for y breach of a Trust,
in Equity? There is certainly no General rule to go effect.
in y C Law of Eng -

Rob L.C. 522. Robert 267. Eq Co 384.3 Ams
312-

But case lies in Court for assignee of a note vs Promisor,
for taking release post notice of assignment. In no case
y wrong consists in merely y violation of merely an Equity -

See 4th Day 6. This case seems anomalous.

Why will in some cases decree a little defective at C Law -

Mistakes in written instruments are gen aided in Chy
only -

In such cases There is a necessity for Equitable Intervention -
for at Law, y instrument must take effect (if at all) as Pow C. 433-
it is. But Equity can against its relief to y Equity & case -
or rather, justice of y case -

1. Rob 94.103.1. Ves. 318- 2. 2370.7. 2 Ams 31. 203. 3 Ams 389- 1. In Chy 381-
2. Do. 1. 78. 415-99-

he suppose a bond intended for 10 £ but drawn
by mistake for 1000 £. Also a deed be given for
1000 acres of land, where 100 were intended. a Ct of Eqty will
relieve vs & excess mistaken - at Law, he gets y whole or mil^r

4th Precedents Cts of Eqty are bound by precedents -

as refusing wife dower in Trust Estate, yet
allowing husband curtesy - ~~Distinction~~ ^{Distinction} between a
mortgage of 5 per Ct, with a clause of reduction
to 4 and vice versa - These are positive rules
founded in Precedent 2. P. Wms 640. 4. R. 432 -

1. Atk 604. Pow. M. 112. 321. Mitford R. 4 -

Indeed y Powers of Eqty are to be learned rather from
a detail of particulars, or from any Gen description or
Definition -

Blackstone's Distinctions The difference between Cts of Law.

E Eqty, consists principally in y mode of administering
Justice - 1. Proc. 2. Trial - 3. Relief -

Hence Eqty Jurisdiction concurrent in matters of ^{account} accord -

First of Proc Compelling discoveries from a Party under
oath is appeal to Party's conscience for facts resting
in his knowledge - 3 Bb. 381. 82. 437. 449 - 6

Hence Eqty Jurisdiction is concurrent in matters of ^{account} accord -
and as incident to y, in y concerns of administration -

Legacies, Distribution - Partnership Concerns - Bailiffs, D. 3 Bb 437 -
relievers, and over, fraud and y facts thus ascertained

y judgment is y same as it wd be at Law -

2. 6 P Wms 145. 3 id 148. 2. R. 277 -

2. Trial In England ^{is} by interrogations on w^h depositions
are taken out of Ct and when witnesses are about to
leave y Kingdom, Aged or Inform - Depositions, "De bene
Esse" may be taken by a commission granted to per, sulate
Testimony - 3 Bb 382. 3.

This unit y usual practice in Court -

In consequence of its power to take repositions, Chy exercises a Jurisdiction wh^{ch} nd be ^{exercised} at Law - If y witness ed attend -

3 Relief Specific as in y case of executory agreement -
to sell and purchase lands - 1. Eq. Ct. 16. 3. 386. 439

The principle is, -

Equity considers "as done what ought to be done", Equity considers a right to a specific subject contracted for - as transferred by y Executory agreement - and ergo will compel a specific Execution of y agreement ^{by ordering} a Conveyance of y legal Title. It treats vendor under y agreement as Trustee to y vendee -

1. Tenth 413. 3. 386. 438. 1. 11th 532. 3. 215.

The want of specific remedy at Law gives Chy a concurrent Jurisdiction in many cases, when damages only are recoverable at Law. ^{Injunction} Jurisdiction vs Waste - Decree to prevent a multiplicity of Suits - Vacating contracts for fraud -

24-26-

1. 11th 303. 1. 386. 438-

A Ct of Chy can give specific relief in many cases, where a Ct of Law can't, and y is one of y means by wh a Ct of Equity obtains an authority superior to a Ct of Law -

As power of a Ct of Equity to vacate deeds or contracts for fraud in y consideration, as if y obligee in a bond had cheated y obligor for '12. y considⁿ in y bond -

A Ct of Law will enforce y contract, but give y person defrauded, an action on y case for fraud - But on a bill in Equity y Ct will decree y deed void. It will decree "ad rem" i.e. if y Def in Equity is justly intitled to something - The Ct of Equity will decree y bill, wh can never be done by a Ct of Law - For their judgment must be absolute and not conditional -

as the condition of assisting Plt^{ff} in Equity

But y Cts of Law and Chy do differ in these three respects, and these are y principal differences, yet there are other cases, in wh they do differ -

As They differ in y rules of decisions, as much as

as well as in their modes of proceedings - sometimes, particularly in relation to penalties -

Penalties In all acts of law, a violation of a Statute is a penal offence, and subjects the offender to a pecuniary sum of money. Penalty - Page 29 - (Penalty in R.I.)

A Court of Equity always considers a penalty as a thing "in Terrorem" it regards a penalty as a debt, and relieves vs a penalty -

The case is of same kind as mortgage. If a mortgagor is not paid on a day appointed at Law - he loses all his interest and the property mortgaged vests absolutely in the mortgagee. but a Court of Equity will relieve vs a forfeiture - for a Court considers a loss of a mortgage, a penalty and as such relieves vs a Court of Equity - Mortgage 11.12 -

Relief vs Penalties has been considered. This

forms a very comprehensive class of cases -

The next head is.

Of Trusts - At law a trustee has a whole estate, and can hold it forever, but in Equity a Trustee has a whole estate, and a Court of Equity will decree a whole estate to a Trustee -

You will perceive then, that the three grounds mentioned by P. 10 are not the only grounds. But besides these distinctions by P. 10. there are others as follows -

First That a Court of Equity may enforce Justice, where a Court of Law is silent &c. when positive Law is silent -

Second - A Ct of Equity, (it is said) may abate y 441.
rigour and supply y defects of C. L. where such, is 1. South
an unforeseen consequence of y C. Law. Milford 3. 4. 103. 370

Example of y First. A Ct of Equity does and always
has interfered by injunction to prevent Waste -
How is y^o acquired? Certainly not by y different
modes of administering Justice in these 2 Cts.
It is acquired from y rule y^t a Ct of Equity

may enforce Justice when law is silent. for y owner cant be supposed to lay by in silence, when waste is committed on his property.

As to y second rule a Ct of Equity enforces marriage settlements, agreements - The rule of law is, yt all contracts made by persons before intermarriage are voided by marriage - but a Ct of Equity holds yt marriage agreements were not contemplated by y's rule, or in other words - yt y's has an unforeseen case - Milford Plead. 3. 4. 103 - 1. Tont 370 -

These are all y enumerated heads of Equity Jurisdiction -
First. A difference in y mode of administering Justice in 2 Cts, viz in y mode of proof, trial and relief and these 3 are treated of by Bb

2^d A Power to relieve or Perpetuities -

3^d A Power to enforce certain trusts

4. The Power of Ely to enforce Justice when positive law is silent, or to abate y rigor and supply y defects of y Law. Post.

5. In abating y rigor and supplying y defects of y Law -

But where any hardship is a necessary, direct and obvious consequence of y Law - however unjust it may be, a Ct of Equity wont relieve vs it - This wd be a power in a Ct of Equity to make and repeal all law - The Ct in y course proceeds on y's principle, yt if y lawgiver had have foreseen y's consequences, he wd never have enacted y's law -

Sources of Jurisdiction have been considered -

The power of a Ct of Equity to decree y execution of specific agreements - is one of y most important powers yt, yt Ct possesses - This power of Equity commenced under Ed IIIth

In Ch. L. reign, it became a general practice.

1. Foulb 27.8. 1. Pow. C. 5.6. Lach 172. Cro Elr 681.

In what cases then will a Ct of Equity decree a specific performance of agreements? Is a rule laid down of Equitable jurisdiction in all contracts, extends to all cases in which y subject of y contract, or y parties to it are within y jurisdiction or process of y Ct, for y Ct acts as well "in Rem" as in "Personam".

1. Foulb
31-
1. Alks 19-
2. Pow. 8.9.
Mitt 184.

Tho y rule when its application is understood, is very correct, yet it is very perplexing when suggested. This rule is a description rather of y circumstances under which agreements may be enforced in Equity, y nature of those agreements may be well known. The meaning is y-

That when the matter in dispute is such as to require y interposition of Equity, a Ct of Chy will take cognizance of it, if y subject is y party bound to within y jurisdiction or process of a Ct of Equity.

But when y subject is in a foreign country, y process must act "in Personam" and not "in Rem".

A bill of Equity has been maintained in Eng as a bill in Chy for y conveyance of a house in y latter place -
former

1. Ves 204-
244-
247-
254-
2 Rem 434-
So in y case of Ed Baltimore and Penn to adjust y boundary line between y respective Grants. A bill in Equity was brought before Ed Hardwick. There y def. was in y Keaton, here y decree was "in personam".
In y case, a Ct of Law ed have no jurisdiction.

So if y subject of y suit is in Eng and y person abroad a Ct of Equity has jurisdiction of y property located in England after having given y person abroad due notice of his intention to demand y interposition of Equity. Here y decree is in Rem and not in "Personam" and y decree of y Ct vests

y title goes on in y Plt

So if a mortgage be made of property in Eng, and y
 mort lives here, y mte may foreclose either here or in Eng.
 In Eng. y decree will act "in Rem" here in "Personam"
 and e converso as to rights and duties - y mte

Anciently a Ct of Equity cd decree only in "Personam",
 now it can decree in "Rem" When y decree is "in Rem"
 as question of title to land, it issues a writ of Injunction,
 and another of assistance 1E. y injunction is to y Def to
 deliver possession to Plt, y assistance is y same as
 a writ Habeas facias possessionem -

1. Pontb 1.

1. Ves 454-

1. Alms 343

380 275-

2. Pow. C. 8-

89, 9-

But where y decree is "in personam" it is enforced
 by a process of contempt and sequestration - of all y Def's
 property and y's property is so held 'till y Def obeys y
 order of y Ct. This can only issue when y Def is within
 y Jurisdiction of y Ct.

The practice of decreeing in "Rem" began in y reign of
 James 1.^d

Marriage Settlement Agreements - are a very comprehensive
 class of cases, in which there is an implication of Equity -

1. Pontb. 88. 93- Cro. Ch. 551- 1. Plt 442-

'Here y Ct held yt y gen rule of C^t Law never contemplated
 marriage settlements - So if an instrument in y form of a bond
 is made during coverture conditioned to make a settlement, a
 Ct of Equity will enforce y condition of y Bond, not that it
 considers y consideration or rather condition as a covert and
 not as a defiance, when y condition is y most prominent
 feature of y Bond 1E. something pertaining to a compulsion
 for performance of y agreement stipulated - It is considered
 as Evic of an agreement to convey, - It runs thus, "If y obligor
 shall convey, y condition is void"

1. Pont 93-4- 2. P^rms 243- 2 Vern 480. 2 Alms 97-

440.

For a Ct of Equity adverts to y substantial object of y Instrument. it latly asks itself what was y object of y agrement and acts in accordance with y ~~accordance~~ with y answer. It considers y Instrument as ev of an intention to convey - 10 Post.

If a settlement is made and executed ^{in a} during sentence,
a Ct of Equity will protect and enforce y^r settlement -
Secus at Law -

So when a settlement is actually made and executed, as a deed during Coverture a Ct of Equity will consider it a marriage settlement and treat it accordingly, for such conveyances purport to transfer property at law. But as it is void in law, a Ct of Equity will consider it as an agreement binding in conscience and enforce it —

Formerly where agreements were made between husband and wife,
during coverture, they could not be enforced in their medium
Co. Libt 112-
1. Dec. 244. - Trustees - But, now if made in secret - & agreement will be
enforced in Equity - with the interposition of Trustees - 2 Dec 308 -
1. Lomb. 94-5 2 Rem 385- 3. Attk. 270- 1. Lomb 95- 1 Rem 241

There was a decision in Comt 1st 1804 - Et of Errors, in wh it was held y^t y^e agreemt was not binding. The import of language is clear - y^t such marriage agreamts wd not bind - but y^e intention of y^e Ct was different - and recent decisions of our Cts show y^e determination to follow y^e Eng Precedents. The decision in y^e list of Day 221. was adapted to y^e particular circumstance of y^e case.

The rule given (Lufora) shows not what particular class of a Ct of Equity rule specifically enforce -

12 12

What sorts of agreements are enforced by Equity remains to be considered—

To proceed then, y Gen Principle is, yt Chancellors

will ^{decree} specific performance of agreements falling within 447.
of jurisdiction and requiring equitable interposition in those cases only generally, in which the law will give damages for nonperformance - Hence if a case will not support a recovery of damages at Law - equity will not interpose -

1. Foul. 139-
ambl. 406-
1. Pl. 185
327-
2. Pow. C. 14.16-
14.16-

Now there certainly ought to be some reason for the distinction, I take it, in the law, in the case of a contract, in which the law in general only a substitute for the remedy at law, the law is adequate in cases where the contract is not performed, the adequate damages will be awarded at Law. nor can the law do more in these cases, remedy at Law, the inadequate at Law - Hence it is in Equity will not enforce a voluntary contract, even under seal, as a voluntary contract will not support an action at Law -

1. Pow. 341.2-
1. atk. 10-
1. Pl. 738-
1. Wes. 450-
474-

Since a contract of a voluntary contract may present some embarrassments - the law cannot know how and when there is a consideration, nor it appears on the face of it -

If a bill is brought in Equity to enforce a contract, the Court in Equity may inquire into the nature of the contract, whether voluntary, and if it is found to be a voluntary contract, the bill will be dismissed, and the plaintiff will be left to his remedy at Law -

The distinction, as I observe on the above, is a technical one, and not a substantial one - there are exceptions to the rule, and a distinction -

And Equity won't always decree a specific performance of an agreement, the damages will be awarded at Law and never when such an interposition will be contrary to conscience - There is a comprehensive rule and will apply in all cases -

Suppose a bill brought to have a decree of specific performance of an executory agreement to convey ^{land} as a bona fide purchaser for value, and without notice to the purchaser -

1. Foul. 359-
1. Pow. C. 151-
1. Pl. 429. 229. 272.

But if the purchaser had notice of the prior agreement, when he made his purchase - Equity will decree to him -

Secus of

has been having no notice -

12. Mm
282-

But an agreement to convey in valuable consideration, is good in Equity and will be enforced specifically as to intervening judgment creditors, for a creditor's lien is only a general one, but a covenant to convey is a specific lien, which is always preferred to a general lien, as in the case of a mortgage and judgment creditors. - In both these examples, damages might be recovered at Law - 1. P Mm 282 -

-13-

So again when a bill is brought to compel a Defendant to assign and pay a consideration. Equity will not decree performance of the contract, if the Defendant's bill be under an encumbrance which can't be readily removed, yet the Plaintiff can recover damages at Law - for altho' damages need be given at Law, yet in the case of interposition of Equity need be unnecessary -
2. P Mm 201. 2. Pow C. 34. 1. Fortb 178-

.14-

So also if one lend money to an infant, who later spends it in purchase of necessaries, a bill of Equity will compel the necessary lender to pay the money lent to the lender, tho' a bill of Law see Par. at Child not compel any payment whatever, for a bill of Equity 19.20-40- considers the lender as lender to the value and yet only of goods purchased by the infant - 1. P Mm 483- 558-59. 5. m. d. 368-
1. Pow C. 258-9

Again when a obligor in an assigned bond, makes a discharge from the obligee with notice and after assignment, the law will compel the obligor to pay the debt to the assignee, tho' a bill of Law will not interpose at all. Here the principle is, yet a chose in action a legal interest can't be assigned yet the assignment of an equitable interest will be enforced in Equity Bla L-4- see 4-

Again where an agreement is made under or by act of a bill of Equity itself - yet the bill will enforce the agreement itself

the no action ed lie at all, as where there is a judicial sale of lands under an order of Chy, yt Ct will decree a specific performance of y Contract. 2. Pow. C. 14-

in Ct of law cannot give damages, for it is y act of another. Ct, Here y purchaser is as much bound in conscience to perform his agreamt, as if it had been a common case of contract. and besides, y enforcing of y agreamt, is necessary to preserve obedience to y Ct.

ie. any legal right.

When y condition of a bond is destroyed in Law by an union of y right and obligation in y same person, a Ct of Equity will enforce y agreamt for y benefit of bona fide purchasers creditors and so of all cases of contracts - (Contracts 141)

10. Mod 515-
9. Do 62-
2. Pow C-
254.

as if y debtor become executor or admr, if y debtor is single, he becomes both debtor and creditor, and in favour of y creditor, a Ct of Equity will enforce payment of y bond - the principle is, yt y law & equity & moral justice, manifestly requires y interposition. for in y no mortal can maintain an action at Law

Such are y exceptions to both branches of y General Rule - -15-
So proceed -

If a recovery of damages at Law wd be an adequate remedy and such cd be obtained, as a Gen Rule, Equity will not decree a specific performance, for Es. jurisdiction isn't necessary, this rule admits of no exceptions, ni where y modern rules of law give an adequate remedy in a case, in wch ancient rules do not - for y Rule see 1. Font 28-139-2 Arch 341-

2. Pow Chy
341-

But y question still remains, what are those particular contracts in wh there can be no adequate remedy at Law - This depends a great deal on y subject matter of y contract - as being real or Personal and I add, as y index rule -

yt so far as equitable jurisdiction depends on y subject matter of y contract, y General rule is yd, yt a Ct of Chy will

Distinction
between
Real and
Personal

desire y specific performance of no other agreement, y n such as relate to y reality, but contracts relating to y reality will be carried into execution, if substantial justice requires it - It is a General tho not universal - rule -

1. Ves. 447- 2. Pow. C. 215. 2. Ety C. 197-

The reason, why y distinction is made between Personality and y Reality is, yt a recovery of damages for a violation of a contract relating to Real property ant considered an adequate remedy - whereas a similar remedy in Personal property is -

2. Ety C. 18. 1. P.M. 317-

Our books go no further on y subject. I.E. y reason of y above rule ant further explained -

Now if one agrees to purchase or sell a personal chattel, and breaks his contract, y law presumes, yt a recovery of y value of y article will be an adequate remedy -

But if a covenants to convey to B y farm B Acce. no damages wd enable him to obtain y same P. Acce. tho as to personal chattels he can obtain y m in many places - This, I take, to be y Gen Principle -

2. P.M. 305.
3. Atk. 383-
1. Ven. 189- But there are cases, where Equity requires y performance of contracts relating to Personal property, and when such appears to be y case, a Ct of Equity will decree a specific performance - 2. Pow C. 217-

2. P.M. 305- Thus A was bound to perform certain acts periodically in certain proportions, and B covenanted to stand in A's place and save A harmless - Here A must be ready to perform his own contract, lest B shd not perform - A upon y nonperformance of B brot his bill praying a specific performance and y prayer was granted -

2. 1. Ety C. 393- 1. Ven. 189. 3. Atk. 383-

A agreed to deliver 800 tons of Iron in different instalments and in y case, there was a similar undertaking as before I.E. y same as in y last example, There y Ct had y an account of y magnitude of y business, and y consequence y might not

If A covenants to convey land to B for a certain consideration Equity will decree a specific performance of the contract, and compel B to pay the purchase money, as well as compel A to convey.

1. 5. Wms

1. 450
1. 348-

A Gen contract to convey lands of certain value, not identified, will not be decreed in Equity, for such a Gen contract creates no ^{Spec} Lien, and a decree compelling conveyance of particular lands, wd be making a contract. Relief however cd be obtained at Law.

Generally, he who demands specific execution of an agreement, must show in a bill, that he is ready and willing to perform his part, for if he will not, or cannot from his own neglect perform his part, a Ct will not decree specific execution, as is founded on a doctrine of mutuality. At Law it wd be different - the diversity don't result from a different construction of a contract - in a law Ct, but here the power of Equity is discretionary and they act in accordance with the principles of Equity, whereas a Ct of Law is compelled to act in conformity to certain prescribed rules.

18.

It is therefore a general rule that when a Plf has performed in part, but is prevented by subsequent events, from performing, on his side, he can not procure a decree for an entire specific execution - of a Def, for the execution must be mutual -

2. Pow. 19-

1. 287-

2. Freeman 35-

Thus A agreed to pay one 1000. £ to B within 10. yrs, B marrying A's daughter and settling a certain jointure on her within yt time, & marriage was held, but the wife died before the expiration of ten yrs, here B brd a bill in Equity to recover the 1000 £, but the Ct held yt as he had not performed the condition on his part, the Ct wd not compel a performance by the Def, without any compensation on his part.

But to go Gen rule, there is an exception, where, ^{plff} having performed in part, and by no default of his, is prevented from performing 'in toto' he is not left 'in statu quo'

Here a Ct of Equity will decree in his favour - 1. Egly 370- 19-
Tomb 385, 2. Pow C. 26. 2. Bern 210 - Pres Chy 312...

And when y plff has been willing to perform on on his part, but has been prevented by a 3rd, Equity will decree in his favour, and y is also y rule of law, for his willingness to do it, is considered an equivalent to actual performance -

Rob 88. 2. Bl. R. 1312. 4. T R. 761-

But a Ct of Equity will not decree a written agreement, Parol Ev even under seal, wh has been discharged even by Parol. Here can rebut parol Ev is introduced to rebut an Equity, tho' it is an Equity not be introduced to compel a performance 12. to substantiate an agreement otherwise precarious - 1. Bern. 240. 2. atro 68- 220-

1. Por Chy 201. 328- 2. ves 299- 6. Br. P. Co. 580- 5 P. 40- Parol 73- 240-

At Law y's parol discharge wd have no effect whatever, and in Chy parol Ev is admitted not to control y contract, but merely to instruct y Chancellor an, in conscience, he ought to enforce y contract after such a parol discharge

again, when y party claiming y execution of an agreement - 20- has permitted it to lie dormant for a length of time and then prays in Equity a specific performance - a Ct Equity will not decree in his favour, ni he can explain his delay by special circumstances, for y delay is a Waiver tho' not a bar to y decree of specific performance -

~ Here where there was a marriage agreement to purchase and settle lands within 3 yrs on y part of y husband, and y party is y wife didn't insist on y performance, but suffered delay, y's delay was explained by y wife, by showing yt he was constantly engaged in active business - wh required all his funds, and y performance wasn't

2. Bern. 276- 484-
2. Pow C. 260-
1. Tomb. 321. 384.
2. atp 615-
2. P. 1. 82-
J. Mod 2-

454 insisted on for his accommodation

1. Atk. 12. It has been several times held, that if a party having joined in
1. Don. 16. 384-
4. Br. Chy 389-
before him his agent at a stipulated time, he can decree
obtain a decree of specific execution, if he is ready and
willing to perform on his part - in a reasonable time, but
is prevented by nonperformance of the Defendant.

1. Est. 627. But in a late case at Law, it is said that the rule in Equity
has been lately altered.

1. Br. P. C. 27-
2. Pow. C. 266-
When a Party seeking a specific performance, has himself
inflicted with a contract or shown an unwillingness to
perform - he can't in Gen obtain a decree, for by acting thus
he has given the Defendant every reason to believe that he never
will be called upon.

To

To the Gen Rule, that the Plaintiff can't compel a specific performance.

2. Pow. 267. when he has not performed himself or is willing and ready
to perform - there is a general exception in favor of children or
- 21-
issue under a marriage settlement, and in respect marriage
agreements differ from all others, now the principle which governs
in this case is a General one, as to any duty to be performed -
those children are human persons, but nonperformance
might be injurious to these children, and ergo Equity decrees
a performance -

In various cases Chy will decree performance, "as near as may be"
If post an agreement made, a 3d intervenes rendering complete
performance unattainable - part performance if consistent with
the 1st will be decreed, if desired by the Party claiming -

1. Inst. 209. As an agreement to lease for 40 yrs, and a 3d prohibits longer
2. Pow. C. 31-
Leases for 10 - Lease for 10 yrs decreed -

3. Br. P. C. 339 -

- Municipal Law. 28 -

So if complete performance be prevented by inevitable accident
or act of God -

1. Pow. C. 448. 2. Inst. 33. 1. Eqty C. 18

3 Br. P. C. 389. Plow 384 -

The doctrine of Equity at present obtains in some cases at Law - 455

This doctrine seems at first to contradict y Rule of Law - Co Litt (in Falk 108) That when a Pt renders y performance of a contract unlawful, y contract is repealed - But y Pt in y case contemplated in y last rule, makes y contract void only so far as performance wd be unlawful - 2. Hen 7b. 163. 234-581-
352.
219.B-
2. 3d. 731-
2. T. 204-

So where one has a power to lease for 10 yrs and leases for 20 yrs, y lease will be good in Equity for 10 yrs - Infra auch - Not at Law, for there it is void in toto, for a Ct of Law must enforce it 'in toto' or not at all - Ambler 740. 1. Tont 212.
Ambler 747. 8. 2. T. 252.

Rule of Law - Where one conveys by grant or even (by devise,) y gives to A for life, remainder to y heirs of his body or issue, he takes an estate tail - and same in Equity when executed.

1 Co 99. 5. T. 299320. Estates in Lands 14- 7. T. 523. 7. 30. 30.
Where there ^{no} articles of agreement to settle lands on A for life, 4 30. 82. 200.
(ut Sup) Chy will decree a settlement on A for life only - 8 20. 515-
remainder in strictly ^{settlement} upon his first and other children in tail - 1. Equity Co. 392.
Thus making A a mere tenant for life and his children, tenants in tail in succession, for in y way, y general interest of y parties is better affected, and y Ct isn't bound to take y technical rules relating to Estate Tail executed - 2. 3d. 658-
1. Tont 390. 1. 238- 2. P. Mms 349-
1. P. Mms 622. 2. Pow C. 41-

Chy will decree y same, altho a settlement is actually made (after marriage) giving to A an estate tail - Decree will go kata y articles - 2. Pow 42-
3 atks 293. Taltot 176. 2. P. Mms 356. note-

So if y settlement is made before marriage, but expressed to be in pursuance of y articles - 2 P 117 349. 2 bes 35. 3 3d. 227
2. P 117 356. 2. Pow. C. 46- Taltot 207. 1. P 117 123. 1. 658-
Note these rules in favour of Issues are said not to extend in favour of female Issue -

But if a will has been admitted after marriage, giving it its full effect and not absorbed in divorce of estate, a will must stand.

• A new agreement in such cases, (ofse marriage and varying from original articles, is presumed -

The same reasoning under which my cannot be relied
on most particulars.

This last rule has been adjudged sound & creditors - for
when Equity is equal, a legal title prevails -

A Court of Equity considers an executory agreement as if it were executed, and from a time when it ought to be executed, and at time w^h time of making a agreement, as in some other time is paid, (but a weight of authority considers a agreement as Executed when it was made and at time only - and all agree at when ^{no} time is fixed, it is executed from a time of making it. (See latter. 1 P. 1ms v. 1. Bro Chy 11 - name 2d. v. 1. 3d. 34)

What is meant by a proposition stated. (suba) it means
y, if it considers y right is title as in conscience said from
y line of agreement in y purchase, and also considers y under
as trustee, in y order from y time - But it may be asked
(supb) if y it considers it as time, does it decree its performance.
The explanation is, if as y agreement does not carry y legal
title, Equity will decree a Transfer of y title, nk before was
not a valid title,

4th Law, y^e principle is a comprehensive one, and its ends most important, and it follows from it, yt if money is advanced or divided to be laid out in Land - Equity considers it money as Land from y^e time y^e devise was made -

It is necessary to rest 100% to be rested in Land, to

be limited to himself and heirs of his body - and he dies 457
before purchase, y 1000 will be considered as land, and 2. 336.
will go as land. wd have gone, had it been purchased, 1. 413.
according to agreement - 2. Pow. C. 83-
320 216 220 71- 532.
483-

Prech Chy 543. 1 res 175: 196

Hence money thus ^{devised} to be laid out in Land,
is subject to Curtesy in y husband of y person, whose
land it is - 12. he will be entitled to Curtesy in y money.
Proviso he wd be entitled to Curtesy of or in y land, had
y purchase ^{been} made -

But it isn't subject to dower of y wife - y distinction between 2. 336.
Dower and curtesy is manifestly arbitrary and unjust and 1. 414.
it is exploded in Connt, and Widow is entitled to 414-
Dower. See Hus et Wife and Estates for life -

In Connt and N.Y. - y wife wd be entitled to Dower,
as has been decided in an analogous case - In y same
principle where there has been a sum of money devised - 1. 320-
for y purchase of Land, yt money will pass by devise 12. 336-
under y description of Land - tho' not in Gen under 2. Pow. C. 109-
y description of Personal property - there is one exception 1. 172-
Infra - 3. 254-
2. Pow. C. 112. 1. 221-

Suppose A has entered into a Contract to purchase a
tract of Land by paying "1000 \$ and before y conveyance
is executed, he dies, devising all his real property to 2. Pow. C. 86-
to B. Property, B will take his money under y devise, and
ys is y case an y money is of a Gen or of a particular
fund - all or any money is bound by ys transaction -

But Equity don't ^{treat} money as land within these rules, in
y agreement to vest it ⁱⁿ lands, is positive - Hence if one utters 2. Pow. C. 84-
yt money shall be left in y hands of a trustee, till a purchase
of land can be made - y agreement isn't satis positive -

1. Lomb. 14. 2. Bern 227-

26-

458
1. Vern 238- 3 money is agreed to be invested in lands or securities,
3 Ark 256- at y election of y Party A, y election must be made,
because y money must remain in money and not go
to money generally paid.

The effect of y election, if it is not made an election,
is not benefitted by y agreement.

And y rule of money may be considered as land holds
"conveyance" as if he agreed to sell land, but before receiving
2. Vern 63. y money, he dies, y land will go as y money had gone,
3 Ark 154. proviso it had been paid in, and Equity will decree y
1. Vern 414. purchaser must take y land and pay y money to y rightful
2. Pow C. 83- heir, the land here is considered as so much personal property
in y hands of y Executor.

Another very important consequence of y principle is, y y
property agreed to be conveyed, being considered as transferred
is at y risk of y Grantor or Vendor - See infra
marginal auth.

There are some passages apparently opposed to y Rule in 2
P. Wms 17- Pow 2d. 660 1. res. 43- y property contracted
for was mere bubble and moonshine, a South Sea speculation.
2. Vern. 280- A having a plantation in Jamaica, agreed
to convey it, but between y agreement and conveyance, y great
Earthquake of y 18. century sunk y land, y vendee had
to bear y loss.

But why shd y property be considered as transferred, or
why shd y vendee be liable to all contingencies happening
to y property before y time appointed for y conveyance? I suppose
Equity regards y future transfer of y legal Title as a mere
formality, for y property is bound in Equity from y moment
y conveyance agreed upon - 2. Vern 280. 2. Pow C. 61. 6-
2. P. Wms 411-
1. 2d 61-
1. For Chy
186-

1. i.e. There are some opinions contra 1. P. Wms 62- 2. Ibid 22-
But I regard y proposition or rather doctrine as fully established
1. Mason 290- 2. Ark 400 1. P. Wms 6, 2. Ibid 22-
220-

But when no future day is appointed for y conveyance, all
agreed y vendee is liable for all contingencies, it may happen
to y property -

459

In pursuance of y Gen doctrine, where y can now, it is agreed
to purchase from B a lease for 3 lives - but before y day
of executing y contract, one of y lives was extinguished by
y death of C. A y vendee was liable for y loss -

A agreed to sell to B, and B to purchase certain stock, in a certain company, y transfer to be made on a given day
but before y day arrived, y charter of y company was taken
away - B refused to pay y purchase money, but Eqly compelled
him -

But where y contract is not of sale strictly, but merely
a sale of y right of preemption, y doctrine don't apply -

Pow lays down y rule different. 2^d Pow 73, his meaning
is y same, But the y money article "ut sup" is prima
facie considered land - yet he who is tenant in fee simple
of y money (or wd be tenant in fee simple of y land if it were
purchased) may at his election, treat it as money and
have it retained as such - Here there are no third persons
who are purchasers under y articles; of course, no right
of others can be violated by such an election -

Suppose y A covenants to purchase a certain piece of land,
to be settled on B in fee simple and then dies, now B is
y only person interested in y case - B after A's death can't
be compelled to purchase y land. It's true, y other party
may insist on y purchase, but y is not y case here supposed -
But if y land were to be settled in B and y heirs of his
body - in one case and C in another C may compel B to
make a purchase of y land -

-28-

480

But in such a case, when land is to be sold & you agree it in fee simple, & change will take place, i.e. land for money and money for land, it is of course not a sale in fee simple, & does not, contrary -

2. P. 175
3. Do 221. n.c.
3. Atk 254. n
250-

But if money is declared to go to & executed, it will go to him as Personal Property, and it will pass by a will not executed. Kala & v. v. frauds -

1. Do Chy 228. 238-

2. Pow C.
114. 17-
115.
1. P. 175
2. Do 174-

If B tenant in fee simple dies, not making a purchase, and proof is admissible to show that he did in his life time, need to treat money as personal property, as you is only rebutting an Equity, which can be done in all cases by Parol Evidence and you can be done, either by proving by Parol Evidence, his declaration or his acts, showing his intention to treat the money as if he had not purchased the land -

I have remarked already, that a want of Equity on your side of PTH in Equity, is a decisive objection to a decree in his favour, and in principle that your interposition of Equity is discretionary.

Hence want of mutuality in an agreement, is a decisive objection to a decree for specific performance, tho' an action at Law will lie for nonperformance.

1. Equ C.
20-

If an agreement is uncertain, a Court of Equity will decree -
2. Pow B. 233. 34. 2. Am 415- see Contracts.

2. B. P. C.
415-

2. Do 232. 34
2. Pow C.

But if an agreement is originally mutual, no subsequent want of mutuality will prevent a decree of specific performance - if the land was sunk by an Earthquake, your purchaser must pay your purchase money.

1. Atk 10-
1. B. v. Chy
156-

Again A. agreed to sell an estate to B, for an annuity to himself and heirs - but A's annuitant died before your first payment - A did never receive any thing for his annuity yet your agreement was originally mutual and certain - All.

these examples forling y doctrine - yt purchaser is liable to 466.
all intervening contingencies

Note - In y case of an Annuitant, no money is ever due
till y expiration of y first year -

In all

In all these cases, y benefit intended by y agreamt
was originally mutual -

Relief vs Penalties

Relief vs penalties unites a distant head a Equitable jurisdiction.
Penalties, wh one might enforce at Law - he must waive,
If he sues in Equity - y bill sec^{will} be demurrable, for if y D of 1. Vern. 60-
were obliged to answer witht a Navier, Plff might resort 2. Pow C.
to & Law 26, and avail himself of y answer to enforce y 204. 207-
penalty - This a' Ct of Equity won't allow - Penalties being
considered in Equity as unconsciable - Maddox. 31. 32. 43-
Equity

And Gen Chy won't suffer advantage to be taken of a 2. Pow. Ch.
penalty or forfeiture, when y substance of y contract may be 341-
obtained witht it, but will relieve vs it on a bill for 1. Pow 177-
yl purpose - As Interest on a mortgage of 5 per Ct witht 2. Do 204-
clause of increase, common case of a mortgage - relief vs 3 after 570-
forfeiture on paymt of y debt on Penal Bond - 2. Do 341-

Page 7. of y Title -

4. Burr 2228. 23. 2. Vern 280. 310-

When ergo compensation can be made kata a clear rate - 30-
of damages, Equity will in Gen relieve vs penalties, for
in such case, y substance of y agreamt can be obtained
witht y penalty - 2. Pow. 215. as Penal bond to secure
a debt, relief vs penalty decreed on paymt of y debt -

So if a bond or covenant ^{is given} for an amount capable of being
ascertained, witht a penalty annexed - as for so much 2. Pow C.
stock or for so much wheat, for y market price is a 265-
satis standard of its value - 3 mod 112-
Id certum est. quod certum
potest reddi - 113-

But when there is no rule of damages, Chy can't relieve

Ibid.

to make covenants not to alien without license of the Lord -
under penalty of forfeiting the land, & substance can't be obtained
without forfeiture there being no rule of damages, Equity
can't relieve us it. There is no known standard or measure
of damages, Ergo no certain measure of compensation -

So then there is a rule of damages, yet if by reason of

1. Com. 68. intervening events, no compensation in damages can be made
1. Fonl. 38. - as a substitute for a Penalty, there can be no relief us it -

2. Pow. C.

205. 207.

W. d. in his marriage articles, covenanted, that if he didn't
settle such a Sum on his wife in 2 yrs, he shd give
all his wife's portion, or interest, & wife died before
Settlement settled - within term, forfeiture must issue, the
amount of the Sum is known: for wife being dead,
no compensation can be made - a Portion is a settlement for
life, and wife was now dead -

Wherever one party is in agreement voluntarily stipulates
in advantage or disadvantage to other in certain conditions, &

1. Com. 220. latter must lose advantage, if he strictly complies with
456. conditions - 2. Pow. C. 210. 213. is a creditor offers to

Paradis

481.

Pow. Chy

-160-

take less on his debt, if paid at a certain day - Payment
must be made precisely at a day - or debtor must pay whole -

But the condition in such a case, can in strictness hardly be
considered a penalty, since thing forfeited or lost, is a
mere gratuity, and a debtor in no event pays more
on national Justice and exact -

Gen Rule - When Equity will relieve us a Penalty in
an agreement on one side - it will on the other, enforce performance
of agreement itself and vice versa -

1. Fonl. 141. on and 2. Pow. C. 136 -

It was plain holden yt when there was a Penalty in the
 account the party bound said his election was
 bound to do y thing stipulated as pay y penalty
 as Bond for with a Penalty conditional in y case. Relief is
 of land & other might refuse to comply if he wth penall
 y Penalty. This wth a great deal of instruction.

(Still)

But now there y Penalty of a Bond seems to be more
 a security for y performance of something & not (Doy. 136.
 vol (Doy. 136. m. of y collateral right seems to be 1 Bond 141.
 bond y thing intended to be obtained & y will not 1 Bond 146.
 in wth y Penalty at Bond. Mortgage & interest y p^{ty} 1 Bond 147.
 ment. See also 1 Bond 147. at "Penalty"

This is done wth y intention as y
 Penalty is p^{ty} of y interest principal & as y case 1 Bond 148.
 may be cast as a performance of y bond & as y case 2 Bond 149.
 used in y Penalty = for a obligor has not in such cases 10 months
 his election to do or thing or the other. He is obliged in 2 Bond 151.
 & other party claims it to do y collateral act or thing 1 Bond 156.
 & other = as Pen. at Bond for the Compromise of land. ves. 128.

When y sum to be paid for nonperformance is in y nature
 of a fine don't ch^y will not return wth it the there is
 a rule of damages. vide infra more.

For here the stipulated sum is not intended 6 Bond 148.
 as a mere security for another thing (at La p^{ty}) but as a stth 470. 1 Bond
 stipulated compensation for y loss of it - a satisfaction substth 3 Bond 174.
 later for performance of y p^{ty} 1 Bond 142. 2 Bond 2228. 2 Bond 2 Bond 1.
 3 Bond 3 Bond 3 Bond.

Can y stth of cases therefore ch^y will not return, per
 monies of y court. now y ch^y restrain its jurisdiction for
 y obligor has his election to do it or pay damages
 offered. On La p^{ty} cases as to be pay stth for every case of
 meadows plowed. Cases of a consent not to plow
 under penalty in several forms. 2 Bond 11. 1 Bond 142.
 4 Bond 2228. 2 Bond 2 Bond 3 Bond.

It was olim holden, yt when there was a Penalty 405.
in y agreant, y Party bound had his election in all cases,
to do y thing stipulated or pay y Penalty.

As Bond with a penalty conditioned for y conveyance of land, obligor might refuse to convey, if he wd pay y Penalty: This wd make a great deal of injustice -
Hidg. Acties in Penalties

But now where y Penalty of a bond seems to be merely a security for y performance of something collateral, (so Doug. 431.
yt y enjoyment of y collateral object seems to have been y thing intended to be obtained) Chy will relieve vs y 1. Tont 141-
Penalty - as Bond, mortgage - and enforce y agreant 1. Dr. Chy 418-
1. New 6.
171-
Jacob L. Dic. are Penalties.

This is done generally by injunction vs y Penalty on payment of y interest, principal &c, as y case may be. Costs, &c on performance of y condition or covenant secured by y Penalty = for y obligor has not in such cases, his election to do one thing or other. He is obliged (if y other party claims it) to do y collateral act or thing specifically -
as Penal Bond for y conveyance of land

1. Lr 533-
2. D. Hms 191-
10. mcd 577-
2. alks 371-
2. Pow C. 136-
- res 528-

When y sum to be paid for nonperformance is in y nature of assessed damages, Chy won't relieve vs it - tho' there is a rule of damages -
vide infra Margi.

For here y stipulated sum is not intended as a mere security for another thing (as supra) but as a stipulated compensation for y loss of it - a ~~sub~~ satisfaction substituted for nonperformance of y agreement. 6. Br & P 417-470-
1. Madon 39-
1. Tont. 142. 4 Burr. 2228. 29- 2. H. R. 194-
2. S. Jan. 346-
3. alks 335-

In y case of ~~non~~ ^{non} performance, he will not decree performance of y covenant, nor generally restrain its violation, for y obligor has his election to do it, or to pay damages assessed - 2. rem. 118-
33-

As Lessee covenant to pay 5 £ for every acre of meadow ploughed - Secus of a Covenant not to plough under penalty 4 Burr 2228-29
2. L. 332-

in usual form -

1. Foul. 142.
2. Ves. 528.

But when y penalty is a mere security for a collateral thing, and not a compensation for it, y obligor has no election in Chy (at Sup). The election is after breach in y obligee - (1 Foul. 142. 2 Ves 528-) Ergo. (at Supra) Chancels will decree performance on his application -

As y case before stated of a Penal Bond for conveyance of land - or y Penalty may be recovered at Law - at his election, in Chancels shd enjoin it (as it wd in y application of a obligor before y ^{its} supra) Since those ^{its} there is no use of applying to Chy for any injunction in such case -

Whether y sum is a sum strictly a Penalty or a liquidated compensation, depends on y construction of y whole instrument -

1. Bac.
544-

And now by y 8th and 9th Will 3^d, 4 and 5 Anne, its at Law are enabled to chancs penalties in bonds - in certain cases 2. Ch Plea 153. Laws R. 25. 6. 2. R 341-
Covent Breken. 19- Cor 357- 2. R. J. 446. 3. Cor 442.
8. R. 120 -

When Chy relieves vs Penalties in Bond for y performance of covenant, it frequently ascertains y damages by directing ~~an~~ an issue of "quantum damnificatus" at Law - and decrees kata y verdict -

Putting aside
Agreements.

Telling aside agreements - in some instances these are specific actions in agreement as in the case of a covenant to build an apartment house, the court should not allow the defendant to set aside the contract -

2. R. 221.
250-

2. Foul. 142. 152. 158. 2. R. 358- 2. R. 220-

Tho' it satis reason, why Equity won't interpose to carry setting aside into effect. Equitable interposition in such cases being dis-agreant 2. P. W. C. 177. 8. 221. 257.

So in all cases in wh there any grounds on wh Dea can rebut y Equity claimed by y bill - ante 19-

But fraud in y transaction is a good ground, not only for refusing to decree an agreant, but also for setting it aside - and unreasonableness, tho' not in itself satis to invalidate a contract, may be one circumstance among others affording Evi of fraud. Gross inequality of price - or considⁿ may ergo furnish Evi of fraud. But y's alone ant conclusive - 2. atts 324 - 2. P. W. C. 203. 3. Do. 290 - Prob. J. C. 326. 532 - 2. Ves. 627 - 1. Fontblb. 2. 3 Chy 176. 2. Vern. 402 - 1. Vern. 465 - Ord on usury. 77. nte -

Agreants obtained by imposed hardships and oppression, (a head of equity distinct from fraud) are also set aside in Chy (as an agreant in a mortgage, yf of interest be not paid at y day, it shall become principle - this is done by taking advantage of another - 2. Pow. 143. 188 - Salt 447 - Saltot 41 -

But such agreants post ratified by y debtor (i.e. after y interest has accrued) freely with "his eyes open" are not set aside - 2. Ves. 152. 1. P. W. C. 727. 3. Do. 294. n - 2. Pow. 163

So of those obtained by fear - (tho' it don't amt to y legal idea of Duress, ^{may} 2. Pow. 163 -

When y oppressive agreant is unilateral, y will be "set aside" as it, as agreant is ex. mure - The y notes ant considered as "Particeps criminis" But it remains one of y equity of interest, and decrees only repayment of principal and lawful interest. Tab 38 - 2. Pow. 148 -

But when y Parties are equally guilty, Chy is neutral, as ne loses at Gambling and pays y money - Chy won't relieve 36 -

458
Setting beyond a express provision of positive law - "In Lari Inducta"
Tallor 41. 1. East 98. Pow 6. 150-

Plaintiff -

Any unfurness of y^e self will prevent a decree in his favour,
1. Ver. 227. 29. to misrepresentation as to y^e value of y^e subject matter. So where
2. Pow. 221. 226- Pitt pretended to be a purchaser for Def^t Brother - when he
was not, and then obtained an agreement for a sale at an
under value -

is as bad as Suggestio fraudis -

1. Pro. Chy 440- To suppression veri" is a disadvantage of def. prevents all
6 Pro. Chy 539- decrees for Pitt - 2. Pow 222- is a bill to compel Def^t
to compute a purchase - an issue presented as finding
J. H. C. 524. 25. a rent of 50 £ and no more than 100 £ the necessary annual
528. 30. 35. value - 2. Pow. 222 -

2. Pow 225. 196- so in some cases where there is a misrepresentation with
2. Br. Chy 326- respect to unfurness, to where there is an agreement for sale
of real estate at an under value, & the estate being freehold, and
not leasehold and in some other particulars the situation
arises -

in Law merely
For a mistake can a contract be set aside, in Law
merely, i.e. an mistake in Law? J. H. - no -

To mistake in some cases, is ground for setting aside an
agreement, Rule, if of y^e mistake, or fact misstated was y^e
cause of y^e agreement, it is set aside - Regard of y^e mistake
was not a "line & per non" to y^e agreement -

1. Ver 400- In y^e case of Pitt was mislead and deceived in point of Law -
2. Pow 196- this no deception was intended - For Rule - ante Pitt
voluntary agreements or contract under seal are not decreed
1. Pow 341. in Chy - for upon ym only nominal damages are recovered
2. Do 242- at Law - where can any damages be recovered if it appear
in a face of y^e instrument, & there was no consideration -
1. altho 10-
1. St 788-

But a compromise of a doubtful right is a ratum conditum

setting

This differs from a case of mistake, which is a bona fide conditum aside
of a agreement, here the parties are aware of a doubt and make a bona fide
a contract of hazard intentionally - 1. P.M. 726. 2. Pow. C. 200. 201. 4 -
2. Atk 587. 92. 1. Pow 142. Little Contracts 17. 18 -

C.J.G. - Parol contracts respecting lands decreed in Chy, if
partly executed (Explained under a ratum conditum)

So in case of Private trusts provable from circumstantial facts -

Agreements obtained by coercion, tho' not amounting to duress - not coercion
decreed, but set aside - So from undue influence -

As. y^e intended husband who release to wife's guardian all
accounts of the profits of a wife's estate - 1. P.M. 118. 2. Pow. C. 160. 162 -
189-264 -

Not so in case of fear arising from a just reverence and respect -
as in a child towards its parent - if a agreement be reasonable -
1. Pow. Chy 369. 1. P.M. 639 - 1. ves 19. 1. Atk 11. 1. Pow. C. 162. 264 -

Intimidation - and a ratum conditum ground for vacating an agreement,
in Chy. is affected by a other party, or in some unfair advantage
is taken - 1. Pow. C. 28. 3. P.M. 50. 1. ves 19 -

It isn't "per se" a ratum conditum cause. see Contracts 6th.

So mental weakness, if a party be legally "impos mentis"
is "per se" no ground for setting aside a agreement -

Secus if attended with fraud or any suspicious circumstances - 3. P.M. 129 -

Case of a young nobleman entrusted to a servant, who was
to guard him from imposition and get procured a bond
him for a 1000 L - 1. Pow. C. 30 -
Little Contracts 40 - 1)

§ 5. Contracts are sometimes enforced in Chy. as an infant, tho'
not valid at Law - Chy. acts as guardian - is money
borrowed by infant and actually expended in necessities -
see Par et Child ante. 13-4

Do-
478

So in other cases, where y contract is clearly for y
infant's benefit -

Agreements operating as fraud upon 3^d persons, are never
decreed but set aside -

1. Galt 150. 1. Dem 348. 2. Pow C.
412, 75 -
3. Pol. 538, 9. 1. Ves. 375 - 1. Pow 185 -

And they are good at Law -

2. T.R. 763. 1. Doct. Rile. 80. 286. 4. T.R. 166. 1. T.R. 86. 322. 550, 0 -

1. Dem. 602 475. They can't be ratified by y parties, being void -

2. Pow C. 176 -

1. P. Wms 486 -

3. Do 75. n -

As a clandestine agreement to return part of y portion to y parent
on one side, in a marriage settlement - contract - These contracts
are unlawful - (Title Contracts 34) 1. Pow. 174. Title C. 307

1. Poultr
245 -

1. Pow. 174. set aside in Chy - as being radically vicious, and unlawful, lending

100

1. Sum 474. to imposition on 3 persons -

1. Dem

14. 27 -

1. Poultr

123-4 -

Contracts with heirs apparent, for y's emolument, are always
set aside in Chy - This not done in equity, as y arms
were disadvantageous to y heir - The rule holds, ^{dem} in y heir is
an infant or not - 1. Dem. 75 167. 1. P.Wms 310. 3. Do 292 -
They cause dissipation. 1. Ves. 125.

-40-

3 P. Wms

292. note

2. Dem. 14.

2. Pow. C.

133.

Such agreements have been set aside, tho' afterwards executed in
some cases, and tho' executed in obedience to a former decree,
in favour of y agreement see 3 T.R. 441 - yet a deed of conveyance
by an heir apparent, may good at Law, by way of stoppage
Deeds. 6 - 3 T.R. 441 - ^{dem} See Records Evidence -

But now y rule, if y original contract is shown to have been
fair, and is ^{ratified} freely upon full information post y heir
comes into possession - it is good - Hence y ratification isn't
good - These executory contracts void at Law &

2. Pow 184. 188 - 2. Ves 159. 1. P.Wms 320 -

C.P.C. - One of title decreed in Chy is to be delivered up -

Agreements as to a thing not tend to oppression, extortion or immorality are decreed, 2. Ves. 238. 1. Do 183- 2. Pow C. 253-

Set offs are decreed in Chy, when Justice requires it to be done - To account in Chy or Law in Eng under St 2. c. 8 - 8 Geo 2^d.

There was no Rule of Setoff. at C Law - (68 aumpost) 2 H.R. 440 - 4 H.R. 123 - L. C. Do 456. Cow 56. 2. H.R. 440 -

By Court Law: If, original petition in Equity are to be not by Supreme Ct, if it exceed \$350. or 35- or if be for relief or any judgment or cause pending before C. Court -

In Court. 131 -

If y subject don't exceed in value, \$ 335 in C Court -

No appeals from decrees of Chy but writs of error, as from judgments at Law - So in Court -

When y subject matter is of uncertain value, y alleged value determines y Jurisdiction -

Of the Power of Chy to issue Injunctions -

Issue
Injunctions

Mit
Injunction is a prohibitory decree restraining a person doing a thing not appears to be vs Equity and Conscience -

They issue in various cases - vs an Attorney, a Party at Law - vs a Guardian. 3 Bae 172. Little Injunction -

The most usual injunction is to stay proceedings at Law - 3. Bae 173 - on y ground of Eq. circumstances, not adverted to in Cts of Law - Little Inj -

C.P.C. - If a declaration is filed, execution is regularly stayed, - 44 - till answer, or further order - Quere false?

C.P.C. - If a winner at illegal gaming, brings a suit at Law - for y recovery of y money won, it having been in winner's hands, but possibly taken away by y Loser) Chy will issue an injunction -

Injunctions, Why can't issue injunctions to stay proceedings in a criminal case in B.R. and if it did, B.R. wd protect any one who shd proceed in contempt of it - Kings Bench is only criminal tribunal in Eng

6. Mod 16-
3 Bue 173-

Injunctions may issue to stay waste, as cutting timber trees, ploughing ancient meadow, in favour of remainder man -
1. Bro Chy 87. 3 Bl. 438-
Whitford Ple. 124. 1. Ey. Co 221- 1. Fonbb. 29-30-3 Bl. 227-

Injunctions to stay waste, will issue in all cases in which action of waste lies at law, and many others -

3. Bl. 227- In action of waste lies only in favour of y immediately remainder,
3. Atk 34. 723- or remainderman having y inheritance, injunction may issue
1. Vern. 23- in favour of distant remainder man - quia it can't hurt
Fear. 450- any intermediate proprietor -

-45-

So it goes as there even in fee in possession, for cutting cutting timber, if he don't apply y avoids in sinking his debt -
once has legal title, therefore can't be sued at law

3. Atk 723- So as there in possession, seems he might diminish Mortgage
1. P. 175- security, before recovery cd be had in Equity -

1. Vern. 23- If Tenant for life with impeachment for waste, pull down
2. Do 738- y buildings, injunction issues, tho not for cutting timber -
Amber. 107. 2. Br Chy 89- 3 Atk 161.

7. Vern 738- So in y last case, Tenant may be decreed to repair -
Bro Chy buildings injured - "with impeachment for waste" a Tenant -
1. Ey. Co 402-

So an injunction will issue as such a Tenant in some other
3 Atk 215- case, as to restrain cutting trees intended for ornament -
1. Ves. 264-

-46- Sometimes it issues as one having y influence as a trustee.
2. Com. L. 51- for y beneficial interest is in y cestui que Trust -

1. Ey. Co 221- Waste lies not as Tenant in Tail, tho possibility of Issue
extinct, but injunction will go as here, if y waste is
very unreasonable -

To injunction may issue to restrain nuisances - as to stop Injunctions -
 y raising of a building obstructing ancient light - But
 right must be founded on prescription - or (^{or are not} if ancient)
 on a an agreement - 2. Bes 454 1. Bb 543-

It goes to stop a building on another's ground -
 1. Fontb. 29-

But y nuisance must be such as y C Law deems a nuisance -
 ergo it goes not vs y building of a house for y incitation
 of y Small Pox - 3 atks 700. 2. Holt 139-140-

It don't go vs common Trespases, for y no remedy afforded ⁴⁷
 at C Law, is deemed adequate - But if a Trespas is so
 continued as to become a Nuisance, it may Issue -
 3 atks 21-

It issues in certain cases, vs one suing for a penalty at
 Law - In Court, Cts of Law Chancery - So now in Eng-
 by the same 29-34- 3 Bae. 69. 29-34. f. go little

Injunctions sometimes issue to stay trials at Law, as when
 appears, it Pitts Equity must arise out of Pitts answer - 3 Bae. 174-
 Dep 2. Chy Cs 66. 76. 33-

So whether y pleading early title, when harassed
 by def in action of Ejectment - but in no other case y ngt of
 of Ejectment, a recovery of one action is no bar to another -
 Runnington 12. Pre Chy 261. 1. P Cs. 266-

This is a Perpetual Injunction - some are provisional -
 some Temporary - Strong 404. 1. P Mon 671. 1. rem 318- 3 Bb 438. 3-
 so to quiet a person in y possession of an Equitable estate,
 as a naked legal title - and has been in possession, 1. rem. 156-
 several yrs, Bacon says, it is now very often granted -
 4 Bae. 174- 2 atk 282- as Trustee agrees to sell to
 A and B then Trust ^{does} sell to B, then Trustee
 disputes B's possession, wh he has had several yrs - Injunction
 issues vs Trustee

474.

Injunctions arise (in other cases, in those of realty)
in consequence of multiplicity of suits, or where many suits
are pending, or are likely to happen from same cause -
as Tenants Tenants, or a Manor claiming profits of a Fair -
So to settle boundaries of land between a number of
Tenants: one suit at Law to settle y question - only as
between 2 -

Milford 104. 4. 125. 8. 1 Vern. 22. 308-266-
In Chy 261. 1 Atk 282. 2 Do. 484-

3 Do. 488. 89-

So. "pendente Lite" between different persons claiming
1. Hebb. 683. to be executors, injunction issues to restrain ^{ym} acting as such
till y question of right is settled -
1. Salk. 179.
2. Bac. 410-

-49- As Chy will relieve vs fraud, so it will issue injunctions
on suggestions of fraud to stay proceedings provisionally,
1. Vern 482. and upon a subsequent hearing of y merits, y provisional
injunction is either made perpetual or dissolved -

Injunctions in favour of authors, restraining others from
amb. 164. publishing yr works, were frequent before y St of Anne -
1. Term. 36.
Milford 124. y^t It secures y copy right to y author at Law. under
1. Vern. 120- certain restrictions or limitations - 4 Burn 2803. 2417.
275-

Decisions 2303-2417. - Miller vs Taylor.

First. y^t at C Law authors had y sole right of
first printing and might maintain action - By 8-
Judges and Ld Mansfield ^{with} ym - and 3. vs it -

2. That printing one edition, did not take away his common
Law right. Seven to Four - Ld Mansfield with y
Seven -

3^d That y C Law action is taken away by St of Anne
Six to 5. tho' Ld Mansfield, who was with y 5-
didn't vote in

The weight of authority is then vs y^e last decision -
real

How far Equity will interfere wth a Judgmt at
Law. see Com. D. Chy - 3. 3 appoc. & atks 223 -

475.

Limit of Powers of Chancery -

Where a judgment at Law is rendered inequitable by some
superiorment. cause, Equity will relieve wth it by
Injunction. 3 Atks 223. Com. D. Chy 3. w. 3 -

476

et ad mentem -

482

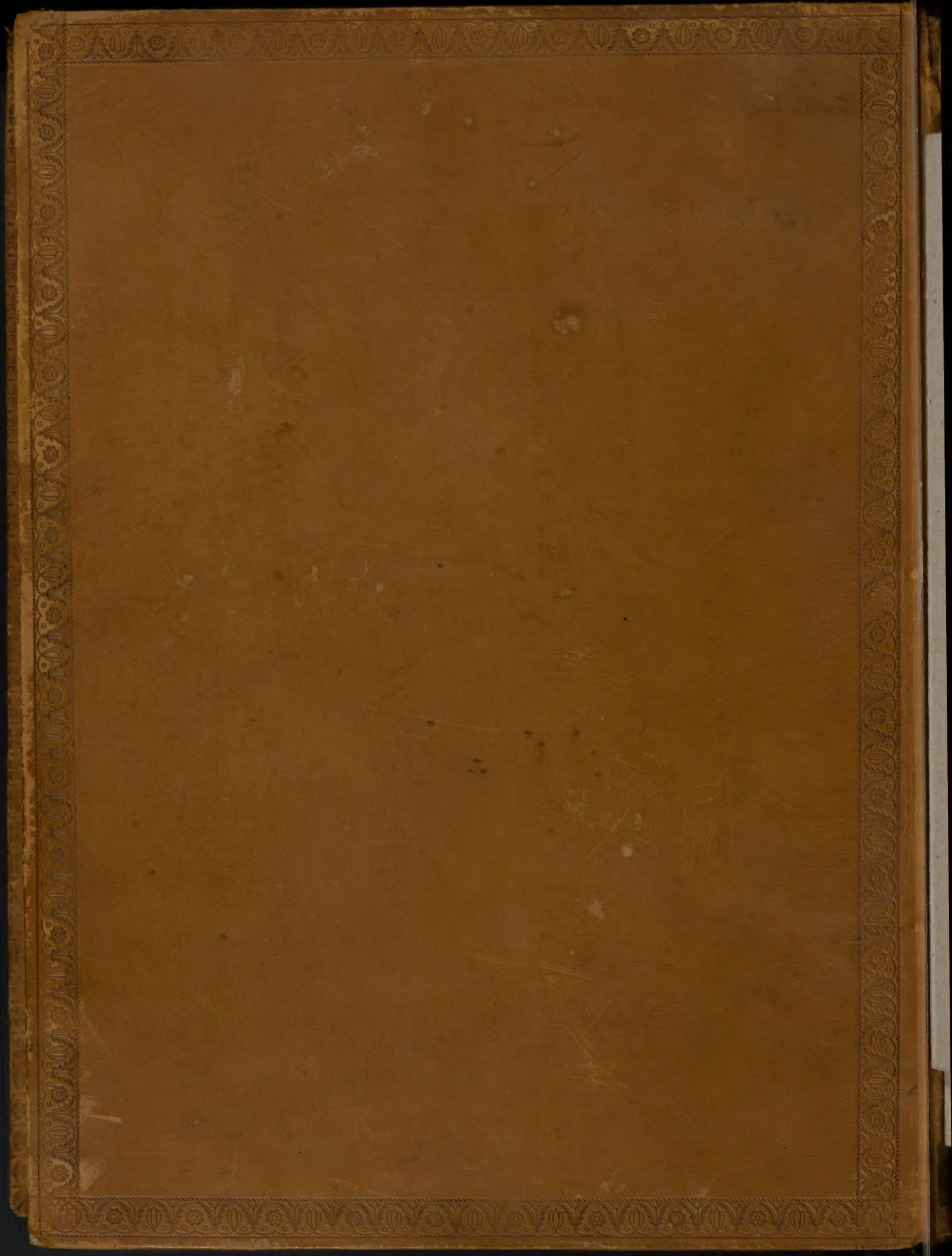
484

480

490

YALE LAW LIBRARY

MAY 25 1934



GOULD'S

LECTURES

V O L.

5.

GEORGE MAN